APPENDIX

IN THE

Supreme Court of the United States

October Term, 1970

~~No. 1288~~ 70-73

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.

Jurisdictional Statement Filed January 29, 1971

Probable jurisdiction noted March 29, 1971

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 12, 1970	Petitioner's judgment of conviction affirmed by the Appellate Department of the Superior Court of the State of California, County of Orange.
November 2, 1970	Petitioner's petition for rehearing/certification denied by Appellate Department of the Superior Court of the State of California, County of Orange.
November 6, 1970	Petitioner's notice of appeal to the United States Supreme Court and application for stay pending appeal.

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., October 12, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had;

AP 872 PEOPLE VS MILLER, Marvin

This matter having heretofore been under submission, the Court now rules; the judgment is hereby affirmed and the cause remanded to Municipal Court. ENTERED 10-12-70.

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., November 2, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP-872 PEOPLE VS MILLER, Marvin

Petition for rehearing and in the alternative, Petition for certification to the Court of Appeal, Fourth Appellate District having been received and considered, the Court now

rules: the Petitions and each of them are hereby denied. ENTERED 11-2-70.

■

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT AND APPLICATION FOR STAY PENDING APPEAL

In the Appellate Department of the Superior Court, County of Orange, State of California.

No. AP-872 (Lower Court: OCMC, Harbor No. M50760)

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. MARVIN MILLER, Appellant.

Notice of appeal and application for stay pending appeal to the United States Supreme Court is hereby given by Marvin Miller, Petitioner and Appellant herein, from the Order of this Court dated October 12, 1970, by which it affirmed the judgment of the court below. On November 2, 1970, this Court denied Petitioner/Appellant's Petition for Rehearing and in the Alternative, Petition for Certification to the Court of Appeal, Fourth Appellate District.

This Appeal is taken *inter alia* on the following grounds, without intent to enumerate all of his defenses, that Petitioner/Appellant by his appeal and his Petition for Rehearing/Certification:

1. Challenged the constitutionality of the application of a "statewide" standard in judging obscenity under Penal Code § 311.2 under the First and

Fourteenth Amendments;

2. Challenged the constitutionality of the application of an unscientific survey to qualify an expert witness to testify as to the "community standards" requirement in the legal definition of obscenity pursuant to Penal Code § 311.2 in contravention of the First and Fourteenth Amendments.

3. Challenged the prosecution under Penal Code § 311.2 for mailing obscene material as a contravention of the doctrine of Federal Pre-emption and the Supremacy Clause of the United States Constitution.

4. Challenged his conviction under the amended language of Penal Code § 311. as an application of an *ex post facto* law;

5. Challenged his prosecution and conviction for mailing obscene material in that under the Fifth Amendment's prohibition against double jeopardy the state was collaterally estopped from claiming that the material was obscene.

This appeal is being prosecuted pursuant to the authority of Title 28 U.S.C. § 1257(2), and

That the Order of this Court, dated October 12, 1970, and reading as follows: "Affirmed," and the denial of Appellant's Petition for Rehearing/Certification constituted a finding that Penal Code § 311.2 of the State of California was constitutional on its face and as applied, and Appellant hereby gives his Notice of Appeal from that finding.

DATED: November 6, 1970.

MARKS, SHERMAN & LONDON
BY: BURTON MARKS
Attorneys for Appellant

[PROOF OF SERVICE BY MAIL annexed, showing service on the Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

CECIL HICKS, District Attorney
P. O. Box 808
Santa Ana, California.

MUNICIPAL COURT OF THE ORANGE
COUNTY JUDICIAL DISTRICT - HARBOR
567 West 18th Street
Costa Mesa, California 92626.

Executed on November 6, 1970, at Beverly Hills, California.]

CALIFORNIA PENAL CODE

§ 311. Definitions

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to:

A motion picture machine operator acting within the scope of his employment as an employee of any person exhibiting motion pictures pursuant to a license or permit issued by a city or county provided that such operator has no financial interest in his place of employment, other than wages.

■

TRANSCRIPT OF TESTIMONY AT TRIAL

[R.T. Vol. III, Sec. I, p. 72]

going to be asked to give an opinion as to whether something is utterly without social redeeming importance; is that correct, as far as you understand?

A As far as I understand, yes.

Q What is your definition as to something having social importance?

MR. CHATTERTON: Once again, objection. This is proper for cross examination; as to the basis of his opinion with you as to qualifications, it certainly isn't proper.

THE COURT: Sustained.

BY MR. SHERMAN: Q Professor, why do you think you have the qualifications to be qualified in this area to determine what is or is not socially important?

A I would base my opinion on the necessity to be in touch with all parts of the United States over the last ten years, through editing journals, through reading the literature that is being produced, from being a consultant of a number of publishing houses, including the illustrations as well as the textroom matter.

Q Well, in taking – let's take each of these items one at a time.

Do you think that you have the ability to give such an opinion because certain people submit certain books to you; is that correct, or certain publishing houses submit to you?

[R.T. Vol. III, Sec. I, p. 86]

A I see.

Q Would you, if it helps you in testifying, refer to which number that you are specifically talking about and then the jury later on will be able to look at that also?

A Fine. I found in 2A nothing to redeem it; in 2B, I was referring to the artwork, which was purportedly an illustrative history of pornography. All of the illustrations seem to be by the same rather bad artistic hand, certainly bad in the inadequate printing job to consider; as almost no literary text, and it is only a series of pictures and listings of books. It is hard to see that this has social merit.

2D; the first sentence of the text is one of the sentences I would use to illustrate the total illogicality of the writing.

Q Would you read that sentence for us? It would keep my interest anyway.

A "By publishing this book the subject is followed up which sex orgies this picture has had." (period)

Q Okay. Thank you. In Exhibit 2F?

A Contains an ad on both the front and the reversal and in no case do I find such text that has content in any way socially redeeming. I should return to Exhibit 2B, which does have a two-column reprint, "purchase bodily an introduction from the history of pornography;" and this

[R.T. Vol. III, Sec. I, p. 87]

is not all that badly written and does have some content, that backside of 2B. Might have some usefulness.

Q But in considering the totality of what it is,

that's before you, People's 2, your opinion that it's utterly without socially redeeming value?

A That is correct, in spite of some advertising claims that appear to the contrary.

MR. CHATTERTON: I have nothing further.

THE COURT: Any cross?

Cross Examination

MR. SHERMAN: Now, I will move, first, to strike all of the testimony of the witness that he has just given, in that he never explained why he reached his opinion.

THE COURT: Motion denied.

MR. CHATTERTON: I'm not sure whether this would be out of order, though I understand People's 1 was not admitted into evidence – I think the Court noted yesterday that it is an exact copy of People's 2.

THE COURT: I did not so note it. The only thing I noted –

MR. CHATTERTON: My point was for the jury to understand and appreciate the testimony. Perhaps it might be beneficial to let them have a quick look at it in so that they will have some idea what the testimony relates to. It has been admitted into evidence, and it might be of some benefit to them in having them to determine this difficult

[R.T. Vol. III, Sec. I, p. 115]

assigning all other divisional vice units of which the City of Los Angeles has 18 different divisions of police. Each one of these divisions has a vice unit.

The administrative vice has jurisdiction over the entire city, reports directly to the chief of police; and I negotiate, inspect, and control over designated vice units.

It is our responsibility or my responsibility then to assist divisional vice units, to advise divisional vice units, and to inspect divisional vice units.

Q Now, in the course of your employment in the field of vice and specifically the administrative vice vicinity, have you received communication from citizens regarding obscene materials?

A I have.

Q And could you give us the approximate number?

A Well, in the past six years, I would estimate in excess of 100,000.

Q And in receiving those complaints, have you had an occasion to review the subject matter involved, and – that's it.

A I have.

Q And what would be the range or the scope of the communications you have received dealing with what types of subject matter?

MR. SHERMAN: Your Honor, excuse me. I will object. I don't see the relevancy and materiality of this

[R.T. Vol. III, Sec. I, p. 116]

line of questioning.

THE COURT: Overruled.

THE WITNESS: The amount of complaints that are received by citizens is pertaining to material that is sent unsolicited through the United States mail, dealing in nudity, sex, different types of sexual devices, et cetera, all in a field of the – all areas of obscenity that go through the United States mail would be the largest scope of complaints – of complaints received by our department.

Complaints are also received and investigated pertaining to conducting violations, locations that are exhibiting total nudity, et cetera; complaints regarding what's being displayed and sold in newsstands, the so-called adult books, et cetera.

BY MR. CHATTERTON: Q Now, in addition to your – those duties, have you talked with groups or individuals relating to their feelings about obscenity and about pornography?

A I have on numerous occasions.

Q Could you give us a brief rundown of whom you have talked with?

A Yes. For the past four and a half years I have been the department spokesman or speaker on speaking engagements relative to obscene type matter, which is assigned to me by the chief of police. I would estimate that approximately 10,000 people I have spoken before

[R.T. Vol. III, Sec. I, p. 117]

through speaking engagements. I have also talked to many thousands of complainants who complain pertaining to different types of material of which they feel are below standard and are obscene.

I have conducted a survey throughout the State of California where we talked to several thousand people and actually polled 1,902 people who filled out questionnaires pertaining to various areas in the field of obscenity.

Q Now, let me ask you a question about the survey itself. What were the questions and what was the procedure used in your surveying these people?

A Well, first, the procedure was to contact people

to be surveyed. These people were contacted in different areas throughout the State of California. They were explained the reason for Los Angeles police officers being for the jurisdictions. The explanation was that in November of 1968, a decision came down from the United States – pardon me, from the California State Supreme Court known as the Giannini Iser Decision that required an expert to testify before a jury that material did or did not go beyond contemporary community standards of the local jurisdiction; that the standard was a state-wide standard, encompassing the entire State of California. This was explained to the people.

The questionnaire was explained to the

[R.T. Vol. III. Sec. I. p. 124, ll. 9-26]

Q Would you estimate for us in addition to the 1,902 which you surveyed the number of people whom you have discussed throughout the state the subject of obscenity, prurient interest, customary limits of candor, et cetera?

A Well, I am constantly in contact with law enforcement agencies throughout the State of California.

I am advisor on the Attorney General of the State of California commission or committee on obscenity, which is composed of 15 district attorneys from 15 different counties and law enforcement members and members from the Department of Justice.

I am constantly in meetings with these people. They meet throughout the State of California. I have been constantly traveling throughout the State of California, testifying in different jurisdictions throughout the State

of California.

I am constantly, daily, in contact with district attorneys, city attorneys, and law enforcement

[R.T. Vol. III, Sec. I, p. 125, l. 1]

officials throughout the State of California.

[R.T. Vol. III, Sec. I, p. 126, ll. 5-8]

We are presently working with people of the Department of Justice. This particular committee was chaired by Attorney General Lynch, and the investigation of organized crime in the field of obscenity –

[R.T. Vol. III, Sec. I, p. 127, ll. 3-16]

BY MR. CHATTERTON: Q Have you participated in meetings of the League of Cities regarding obscenity?

A I have.

Q And would you explain to the jury and the Court what that entailed?

A California League of Cities is composed of approximately 400 different cities throughout the State of California, who in the particular meeting of which I was invited and participated, was in drafting certain types of ordinances relative to the field of obscenity, which was given the power to these local jurisdictions in November of 1969 by the California legislature. The meeting was to draft certain types of ordinances that could be used in regulating certain type of conduct.

[R.T. Vol. III, Sec. I, p. 128, ll. 4-10]

Q Have you seen any polls conducted by others in the field of obscenity?

A I have.

Q And what polls would those be?

A This was the Gallup poll, which was conducted, using 300 localities throughout the nation, conducted May 16th through 19th, 1969.

[R.T. Vol. III, Sec. I, p. 128, ll. 18-26]

BY MR. CHATTERTON: Q You can continue with your answer on the Gallup poll.

A Yes. This poll was conducted, as I stated, using 300 localities throughout the United States, including the State of California; and it was conducted May 16 through 19th, 1969. And it asked certain relative questions regarding the field of obscenity. And then it used percentages to depict how many people answered one way, how many people answered another way.

[R.T. Vol. III, Sec. I, p. 129, ll. 15-23]

BY MR. CHATTERTON: Q Now, have you traveled about the state and observed what materials were being offered to the public by way of literature and stuff like that?

A I have.

Q Approximately how many counties have you traveled in?

A I believe I have been in 28 different counties throughout the State of California.

[R.T. Vol. III, Sec. I, p. 130, ll. 4-26]

Have you ever testified as an expert in this field before?

A I have testified in the last – or since February of last year on 26 occasions throughout the State of California.

Q Have you ever been qualified in the Superior Courts?

A I have.

Q Have you ever been qualified in any municipal courts?

A I have.

MR. SHERMAN: Excuse me.

BY MR. CHATTERTON: Q What counties?

MR. SHERMAN: Excuse me. Excuse me. I will object to the last two answers of the witness's being qualified in the past as being irrelevant and immaterial to the Court decisions in this case.

THE COURT: Overruled.

THE WITNESS: I have qualified as an expert in San Mateo Superior Court, San Mateo County. I have qualified as an expert in the Superior Court of Orange County. I testified as an expert on numerous occasions in Los Angeles County, Sacramento County, San Francisco

[R.T. Vol. III, Sec. I, p. 131, ll. 1 - 2]

County, Merced County, Santa Clara County, several other counties that I cannot recall offhand.

[R.T. Vol. III, Sec. II, p. 8, ll. 1-4]

hundred and fifty people from Orange County were surveyed

because the law says the entire State of California. So we didn't particularly bother about one area. So we never totaled one area. We totaled them in as a jurisdiction.

[R.T. Vol. III, Sec. II, p. 11]

procedure you used?

A Well, I don't know if this would be classified as a scientific. First of all, we decided we would take a cross-section of the state by population versus urban versus rural. Now, we took all the larger areas to encompass in the state; such as, Sacramento, San Francisco, Los Angeles, San Diego; these being the larger cities in the State of California.

We then went population-wise of different states, pardon me, different counties throughout the state to show populations of under 21 – in a particular area 25,000; in the range of 25 to 50,000; in the range of a hundred to 200,000 – trying to get different media that was there instead of going strictly to the larger areas where we could get more people. But we wanted to get the rural versus the metropolitan areas of the State of California. We did this.

We asked and researched people from different groups from the Jewish religion, the Catholic religion, et cetera, different groups, church groups, such as this, were interviewed. Different fraternal organizations were interviewed; people from the PTA, who make up a pretty good cross-section of the citizens who have children, who are interested in their schools and community affairs, were interviewed, coming from many walks of life. Naval Reserves, to show a younger type of person who the – generally who

[R.T. Vol. III, Sec. II, p. 12]

are committed to reserve duty were interviewed; to try and capture people in this range and who are – many who were in school.

We tried, and I admit that it isn't very scientific, but that's the best that I can do. And that is basically the way we conducted the survey, asking for assistance in other jurisdictions, lining us up in a cross-section. Then we talked to American groups. We talked to people who are in San Francisco who are millionaires. We tried to hit the range full-fold.

Q Now, basically you relied on other people to help you get a cross-section; is that correct?

A No, we did not. We relied on them in a sense, in what you're saying is true, in lining up different groups. We sent them a letter and explained that we wanted to talk to them. We did not want one group. We wanted a variety to begin with, different people; but we were assisted by other people, yes, sir, in lining up the groups.

Q Now, Sergeant, you are basing – well, can you give more weight to the survey than anything else as helping you to determine what the community standards are for the State of California?

A I give quite a bit of weight to the survey, but a lot more. I give weight to my past six years in the field of obscenity and the talking to many, many people and running across a few people that state that some things –

[R.T. Vol. III, Sec. II, p. 13]

there's film being accepted in a community – I don't

think we see it in any other location throughout the United States; and if films are being accepted, this is a rare occasion, actual acts, sexual intercourse, et cetera; this is a rarity because it has never been accepted. I don't think –

MR. SHERMAN: Excuse me. I move to strike the last answer of the witness.

THE COURT: Give us your opinion.

That will be stricken.

BY MR. SHERMAN: Q Now, in the survey you interviewed 1,902 people? Now, out of this 1,902 you can't break down the ages for us?

A No, sir.

Q Can you break down the economic disparity of the people?

A No, sir. And if I might answer that, after I say no, sir, enlarge on it – the reason that we did not even take that into consideration, but I can tell you –

Q The answer is you did not break it down?

A And I'd like to explain about –

Q Please explain.

A Well, the reason it wasn't put in there was because we felt it had no basis to be in there, a man being an average person whether he is rich or poor; and we loading our questionnaire by all rich men or all poor men. It

[R.T. Vol. III, Sec. II, p. 14]

wouldn't be as valid as if we took a wide spectrum.

I can testify personally that I saw the people I surveyed, and they were from all categories.

Q Did you ask them how much money they earned?

MR. CHATTERTON: Objection. It has been asked and answered.

MR. SHERMAN: No. He has testified -

THE COURT: Overruled.

BY MR. SHERMAN: Q First of all, let me ask you this, Sergeant. It's your opinion that the economic status of a person makes no difference; is that correct?

A I think in going to apply to this particular field that you can be rich or you can be poor and you can still have an opinion as you can still with an average person in this field. It differs from fields of economics and status in the community. I don't think status in a community has anything to do with whether a person thinks that this type of material is bad or good.

Q Sergeant, I don't want to dwell on these kinds of points; but this is the basis of your opinion in developing a survey; is that correct?

A That was the basis of what we didn't ask them, how much their financial and worth was, to put it into a basis; because it was none of our business, and we thought it didn't have anything to do with asking them what they thought the community standard was.

[R.T. Vol. III, Sec. II, p. 15]

Q Now, prior to making determinations like which questions to ask and which questions not to ask, because you would not feel it was relevant or irrelevant to your survey, how did you go about to get this kind of information? Was that from Professors Brown and Lacornon(?)?

A No. This particular questionnaire was drafted by myself and by a member of the Department of Justice, State

of California. We had a combination of 14 years in the field of obscenity; and we asked attorney generals – pardon me – district attorneys or deputy district attorneys from Los Angeles – the city – attorneys from Los Angeles and from Santa Clara County to go over these prior to them being written up.

Then we were submitted to an Attorney General committee prior to having a survey being conducted to write to 15 district attorneys to look at the different questionnaires and make comments that they thought it was a good questionnaire.

We then commenced the physical portion of asking people to fill out the questionnaires.

THE COURT: It's about time we take our afternoon recess.

I will admonish the jury do not discuss this case, any feature of it, and personnel involved amongst yourselves, or with anyone else. Do not form an opinion as to any matter that has been presented to you in this

[R.T. Vol. III, Sec. II, p. 20]

which they are asked in any way reflects your prior biases?

A No, sir. I do not.

Q Now, you have indicated that this survey was prepared on the basis of visiting 15 counties?

A 18, I believe.

Q 18 counties? Excuse me. How many counties are there in the State of California?

A 58.

Q And none of the – no questionnaires were sent to the other 40 counties – that is, part of this survey?

A No, sir.

Q Now, I take it that the counties you went to included cities which – there is: Los Angeles and San Francisco and San Diego –

A That is correct. The survey was made up of 90 per cent of the population of the State of California.

Q Do you have – you mean to tell me 90 per cent of the population lives in 18 of the counties –

A That is correct, of the ones we surveyed. You have got counties that have an extremely population like 25,000; some counties where – Los Angeles has, I think, the latest count was over 7,000,000 people. There's just 19.8 million people in the State of California. And Los Angeles has almost over a third in it.

Q Now, taking Los Angeles County for the moment. Of these 1,902 people, how many people were

[R.T. Vol. III, Sec. II, p. 21]

surveyed in Los Angeles County?

A I don't have that – that count with me. I never counted how many people in each different jurisdiction.

Q Well, you would agree, would you not, that if you were going to prepare scientific surveys you would take in a third of the people living in Los Angeles County to make it fair? You would take a third of the people in Los Angeles?

A No, I would not; not in this particular field. And I might state the reason why. To take a third of the people of only one jurisdiction would weight the poll, I believe, more population-wise. We have area-wise too, that has to be reflected in this particular survey. We could have taken only the people of the City of Los Angeles and said, "Well, we

captured a third of the State of California."

But we felt that that was not what the survey itself, area-wise – what is being shown in these particular areas? What is being condoned in these particular areas; what the people think in the particular area. That is of as much importance as the population.

Q Well, Officer, would you agree that if you took 2,000 people in the State of California, 750 were from Sacramento County, and 250 people from Los Angeles City, that that would be out of proportion?

A I would say that it would be, yes, sir.

[R.T. Vol. IV, Sec. I, p. 35]

BY MR. SHERMAN: Q Well, if you just had the text here of this exhibit and none of the paintings, you wouldn't consider the text without social redeeming value, would you?

A I would have to see this before I could so testify. There is nothing – nothing in this material that would lead me to suppose that there would be much value than even the full text.

Q Well, there is an article on the back of one of those exhibits –

A Yes.

Q – Exhibit 1F. Have you read that article?

A Yes, I have.

Q Now, if you had just seen that article and nothing else, would you then come into court and say that article was utterly without social redeeming value?

A No. As I testified yesterday, the one point, in fact, that I must make is that this article does have some content, whereas everything else is totally without value.

Q So, the article has some value to you?

A Correct. It has some content, and it does have reason to presentation.

Q Now, what your major objection to these brochures is are the pictures?

[R.T. Vol. IV, Sec. I, p. 40]

BY MR. SHERMAN: Q My difficulty, Professor, is understanding the value you place in assistance in making your determination. So what I am trying to inquire from you is do you consider this work without redeeming value because of its artistic quality or because of its subject matter? This is my real concern. Is it the subject matter, the artistic matter that bothers you –

MR. CHATTERTON: Excuse me, your Honor. He has been asked and answered the reason he finds it without social redeeming value. He said the pictures, the writing, the content, the printing. Now, he is attempting to change or misstate the testimony.

THE COURT: Sustained.

BY MR. SHERMAN: Q Do you find this subject matter of these paintings to be utterly without social redeeming value?

A I believe I covered my opinion in that area clearly in speaking of Portnoy's Complaint. The subject of masturbation would be considered a taboo subject. It has been in many cultures and in our own culture for many times, per se. I do not find that subject matter improper for artistic use. I do, however, ask that it be artistic use that has a reason for being. That it has some,

you may use those abused terms, "social value."

Portnoy's Complaint has this, and I find the book not objectionable. Picasso's collection of erotic

[R.T. Vol. IV, Sec. I, p. 41]

paintings may have this. It has been so testified to by some fine artistic critics. This packet of material to which I am testifying – I find to have no social value.

Q But you agree that men and women in poses such as this and doing such as these things do have social redeeming value if done by artists that you might respect?

A Again, I cannot answer in the yes or no way. I think I just answered the question in the best way I have; answering, that the subject matter, per se, is not at issue; the fact that men and women have intercourse in a variety of ways. These are human; and human acts make them a subject for human discussions, presentations, artistic treatments – the question is how is it presented? What is the particular theme when I look at the totality? I can only judge the totality.

Q Now, in determining whether a particular subject matter has social redeeming value, you are talking about social redeeming value to the whole culture, are you not, rather than just one aspect of the culture?

A I would assume social would cover the entire society.

Q So, for instance, if we wanted to know about, let's say, the American culture of 1970, we have to look at the mystery novels as well as the poem?

A Correct.

Q And we have to look at works such as Picasso

[R.T. Vol. IV, Sec. I, p. 45]

utterances.

Q Well, for instance, these books that you are talking about that are sold in underground. These are books that are sold, I assume, in great quantities?

A I assume there is money in it or the people wouldn't bother.

Q All right. Now, if that being so and they are accepted by a segment of our population, from that point of view would those works then have some socially redeeming value merely by the fact that they are being accepted and are a part of our culture?

A No. The facts of their acceptance would be all the value they have. In and of themselves they might have no value at all.

Q In other words, if they are accepted, that alone may mean they have social redeeming value?

A No. I said the fact that such are sold in an X quantity in a given society may be the total significance and value. The thing itself may be without value.

Q Let's be precise. Are you familiar with one of these novels called The Hungry Pussy?

A I have been asked to read that on occasions, and I found it without any merit except that it was such a collection of pornographic things as perhaps to have some measure of the diseased imagination of the writer, but I

[R.T. Vol. IV, Sec. I, p. 54]

A Yes, I am.

Q And Doctor, for the jury, would you indicate to

us your educational background?

A I have a B.A. in English Literature from Los Angeles State College and an M.A. in English Literature from UCLA and a Ph.D. in American Literature from UCLA.

Q At the present time are you teaching?

A Just an extension course at this time.

Q And where is that extension course being taught?

A UCLA.

Q And what subject matter are you teaching?

A The novel as written by and for women.

Q For women?

A Yes.

Q Now, in the past five years, can you tell us each and all of your teaching jobs or positions?

A I'll try. After I received the Ph.D. from UCLA, about seven years ago, I taught full time at UCLA for two years; and then after the birth of my second child, I taught mainly an extension for UCLA, but in various sections of the city.

Q Could you tell us which courses you taught at UCLA?

A I taught a course of Frenchman Composition and Frenchman Writing and Frenchman Literature, from the

[R.T. Vol. IV, Sec. I, p. 56]

Q So, it would be a wide variety of people?

A Yes.

Q Now, when you obtained your Ph.D. in American literature, did you write a dissertation?

A Yes, I did.

Q And on what subject?

A The Hollywood novel.

Q And can you explain to the jury a little bit about your dissertation – what you mean by the Hollywood novel?

A The Hollywood novel is a novel written about Hollywood with Hollywood characters as the main characters of the novel. There are several written by very well-known American writers, and then hundreds written by not so well-known American writers. And I tried to read all of them I could find and come to some conclusions about American life in terms of its vision of Hollywood.

Q Have you written any articles or books?

A Yes, I have.

Q And what books and articles have you written?

A I wrote a scholar article on the basis of my dissertation about the mystery novel as it takes place in Hollywood, which was published by the Southern Illinois University Press.

I write regularly for West Magazine, the Sunday supplement of the Los Angeles Times; and regularly

[R.T. Vol. IV, Sec. I, p. 57]

for TV Guide, and not so regularly for Los Angeles Magazine; and Status Magazine; and since just last week, Cosmopolitan Magazine.

Q Have you written a novel?

A A chapter of my novel was just bought by Cosmopolitan, and then in two months I have a novel coming out.

Q And what is the name of this novel?

A The Rest is Done With Mirrors. And it's published

by Little, Brown.

Q Now, this book is coming out, you say, about two weeks?

A Two months.

Q Two months? And is this a novel, I take it?

A Yes.

Q Is it the first novel that you are going to have published?

A Yes.

Q Now, have you ever qualified in this particular municipal court as an expert in the area of obscenity?

A Yes, I have.

Q And when was that?

A I believe it was about six months ago, and with regard to these brochures; but I don't know the exact date.

[R.T. Vol. IV, Sec. I, p. 59]

and writers of some of these books and wrote to publishers of the books and, let's say, speak to everyone I could in short that – that had anything to do with this business.

Also, people in stores where these books were sold on newsstands to see how they sold – how much they sold.

At that time I wrote letters to colleagues in universities or junior colleges or colleges in Berkeley, San Francisco, Sacramento, Fullerton, Riverside, and San Diego, asking them just exactly what was for sale and could they find these books around town. They said they could.

Then at two other times West Magazine bought the article but decided after a year or so not to use it. They gave it back to me. And at two other times in the last four years

other magazines have suggested that they would want it, and I have updated it and do the same thing with regards to my colleagues in those places.

Then last summer with regard to these brochures I wrote my colleagues again in these universities and asked them if they could find comparable material, comparable graphic material such as this in universities, libraries, public libraries, legitimate bookstores as well as newsstands; and they all wrote me back their findings.

Then besides that, I have had some informal contact with people who live in smaller towns through the state, asking them much the same kind of questions.

[R.T. Vol. IV, Sec. I, p. 60]

Q And this has been something that you have been doing for the last three or four years?

A Since 1966, but this more organized way of doing it where they went to both – well, to not only the newsstands, but the legitimate bookstores and the libraries and the university libraries only since last summer, when the question came up of state-wide standards.

Q Now, for what period of time have you been testifying as an expert in this area?

A I am not sure of the exact date, but I think it's from 1966.

Q And on how many occasions have you testified?

A I would say about 30 times.

Q And in every case in which the Court requested expert testimony and permitted expert testimony have you qualified on each and every occasion?

A Yes.

Q Now, was there anything else that you know of that would qualify you as an expert in this particular area you haven't covered? That's a great general question. I take it you reviewed personally materials such as this and other materials forming whatever conclusions you have?

A I would say the only thing I could think of would be kind of a consuming interest in the so-called popular forms of art, popular forms of entertainment, I guess, television and the movies and light novels as well as

[R.T. Vol. IV, Sec. I, p. 65]

Q I see. That was yesterday?

A Right.

Q Now, in considering what your qualifications are for judging what the contemporary standards are throughout the state, I take it then, that you visited Sacramento and you have talked with people there?

A I – sent out letters more or less, not continuously, but from time to time to my colleagues in various universities who in turn went out mainly to see what was available for sale in the various cities and towns.

Then last summer besides seeing what was available in libraries as well as just for sale, what was available in university libraries and public libraries openly and bookstores; I'm getting to it. Am I answering the question?

Q I am not sure whether you are or not, but go ahead.

A Oh, I visited San Francisco and San Diego and interviewed various people on the street as well as topless dancers and people of that sort.

Q I see. Now, is it your understanding that it being offered to the public is an indication of what the contempor-

rary community standards are as far as obscenity is concerned?

MR. SHERMAN: Objection, your Honor. Irrelevant and immaterial as to her qualifications.

[R.T. Vol. IV, Sec. I, p. 66]

THE COURT: Overruled.

THE WITNESS: I think it would be a question not of what's – what's being offered but what they buy that's offered.

BY MR. CHATTERTON: Q All right. Now, specifically have you done any studies on what was purchased?

A Yes, yes.

Q Okay. Now, when you made these studies, did you ever receive copies of what it was that was being purchased?

A Yes, because I approached the matter – rather I did talk to various sellers; but I also talked to distributors and asked them for this article in West Magazine about how much money they made and from what books; and they gave me the books and showed me and said so and so much money. "This is a big moneymaker." "This wasn't a big moneymaker." So that I did have an idea of the kind of things that were sold.

Q I see. Now, when you wrote to your colleagues seeking their help, by colleagues you mean personal friends of yours or people who also teach in the English area or what?

A Personal friends of mine that I had been through graduate school with who had gone to – to teach school in San Diego State, in Berkeley, and San Francisco

[R.T. Vol. IV, Sec. I, p. 72]

Q By random sampling, do you include the people

whom you talked to in Sacramento? Did you go out on the street corner?

A No, again, this would be simply in the course of a conversation; and so it would include, for instance, a lot of my daughter's friends, who have been 15, 16; and a lot of my mother's friends, who would have been 50 or 60; and a lot of my father's friends, some of them whom are 70.

Q We'll assume your mother and father live in Sacramento?

A No.

Q Well, let's say the people in Sacramento. Where were you when you talked with them?

A At the home of Dan Phillips's during – at one time during a – like a wedding party for one of his cousins.

Q All right. And what was the age range there?

A A lot of parents and a lot of sisters and brothers and nephews and cousins; and again, it would go from people who are old enough to be at a wedding without making a fuss to all the way up.

Q And when you talked with them, I take it, you showed them erotic pictures and asked them what they thought of them?

[R.T. Vol. IV, Sec. I, p. 74]

MR. CHATTERTON: I have nothing further.

THE COURT: Any redirect?

MR. SHERMAN: Nothing, your Honor.

MR. CHATTERTON: I would at this time object that there hasn't been sufficient qualifications, your Honor.

MR. SHERMAN: I am offering, your Honor, for all three purposes. I think her background and training and her

Ph.D., of course, would permit her to testify as she has testified on some 30 other occasions as to the social importance of the material.

THE COURT: I want to clear up one point for the purpose of the record – Dr. Cee, is it?

THE WITNESS: Yes, sir.

THE COURT: When you said that you were qualified in this court on previous occasions, that was before another judge, was it not?

THE WITNESS: I believe so, sir.

THE COURT: So, it was simply in this courtroom for some other judge?

THE WITNESS: I took it to mean in this building.

THE COURT: It was another judge, that's right?

THE WITNESS: I believe so. I don't recognize you.

MR. CHATTERTON: Excuse me, your Honor. Might I ask one question with regard to – regarding that specific

[R.T. Vol. IV, Sec. I, p. 111]

Q Why don't you take them as a whole; and if it is necessary, we can go into them individually?

A Well, as a whole I notice there seems to be an emphasis on things that we ordinarily consider as deviant sexual stimulants, and things which we feel, I mean, as people are somewhat immoral; and by these things I mean, such things as orgies, bestiality, homosexuality, and in some cases exaggeration of phallic and genital areas; and in some of them evidence of sadism, and in general all the things which I personally associate with the harmful type of aphrodisiac or harmful type of pornography.

And if I were to consider these as socially redeeming,

from my own viewpoint as a physician –

Q Excuse me. I hadn't quite gotten to that question yet.

A I am sorry. Okay.

Q Right. Now, I am merely concerned with the prurient interest and the shameful or harmful effect that goes upon an average person. Were there any other comments?

A I should also mention that even though some things like oral genital contacts are practiced by a lot of people that if exposed to the public then they make us feel shameful. I should mention those too.

Q And in what manner would they make the public feel shameful?

A Well –

[R.T. Vol. IV, Sec. I, p. 115]

psychiatrist why the average person feels shameful or has a morbid interest in sex, nudity, or excretions, upon viewing it; that the reasons are explicit and are called for in his opinion.

THE COURT: Objection overruled.

BY MR. CHATTERTON: Q You may answer, Dr. Wagner.

A Well, when a human being looks at any of these pictures, why the pictures invite you to take part in a sex act. You take part by just looking yourself; but the degree to which – if you just throw the picture down, don't look at it any more, this is one thing you still may remember, what you saw; but when you are looking at the picture, well, you are looking also at an invitation; and so you have to fantasize just like if you read a book. You may identify with the hero

or even the villain or with somebody, you know, whatever we look at or read. If we see a movie, why the people watching the movie sort of take part in the action by fantasizing that. This is happening to them but not within reality.

So with these pictures, if you are involving yourself with them, you have to fantasize or imagine that you are participating in some of these activities.

And I think most people know deep down in terms of orgies, which started this question, that basically orgies are destroyant of human love and close

[R.T. Vol. IV, Sec. I, p. 116]

human relationship; because if instead of developing your love, your tender love feelings toward your partner, you tend to spread it around – and orgies, you are just saying that sex and love aren't really connected; that love means nothing; that you can pass it around, and you don't have to stick to any one person – well, what I have seen happen to a number of people who involved themselves in orgies, even small orgies by wife swapping, or large orgies – they have orgy clubs and orgy groups – is that invariably these people end up getting divorced and running off with somebody else in the orgy.

Some people of the orgies even stimulate a mental breakdown. If they have had rigid attitudes about sex and they have been brought up very straight-laced and have good morals, well the orgy itself is very demeaning; and it causes breakdowns of the love relationships between two people. And ordinarily it is sort of tempting, especially if the people haven't even slowed down in their sexual life or had any difficulties at all, why the thought of an orgy is very forbidden and very tempting.

And so looking at a picture like that, starts a controversy in somebody's mind. And they are both attracted and repulsed; and therefore, they develop anxieties. Then they feel usually very ashamed, usually disgusted; and sometimes they are still interested in looking again, though not infrequently.

[R.T. Vol. IV, Sec. I, p. 117]

Looking at pictures of this type, if one is this way, looking might resolve in masturbation; and as I say, most people have a lot of guilt feelings about masturbation in our society. And I am not trying to say if that is right or wrong from a psychological point of view. I am just saying that this is a reality of human beings in our society and – so, that's all my answer about that actually.

Q Now, let me ask you this. Referring to the evidence which you have in front of you, the five documents, again, listed under People's 1, in examining that as a whole, do you see anything – strike that.

Do you have an opinion as to whether or not it is utterly without social redeeming value from a medical point of view?

MR. SHERMAN: Objection, your Honor. Irrelevant and immaterial from a medical point of view. It is a general standard.

THE COURT: I am going to sustain the objection but on the basis as you have stated, from the medical point of view – is general. Objection sustained. Strike the words from a medical point of view.

Do you have an opinion as to whether or not it is utterly without social redeeming value?

THE WITNESS: I have an opinion.

BY MR. CHATTERTON: Q And what is that opinion?

[R.T. Vol. IV, Sec. I, p. 118]

A I don't feel that it is of any social redeeming value.

MR. CHATTERTON: And I have nothing further.

THE COURT: Cross examination.

MR. SHERMAN: Thank you.

THE COURT: I think before we get into cross examination, we will take a recess for this afternoon. Before we take a recess, however, obviously this is not going to be through tonight; so we will have to set this matter over to next week.

I was brought in here for a three-day case. We are now on our fourth day. So I had made arrangements for the three days.

I will be available on the following days only. Monday afternoon, Tuesday afternoon, all day Wednesday, Thursday afternoon, all day Friday.

MR. SHERMAN: Your Honor, I unfortunately was supposed to be scheduled for two trials in Federal Court.

THE COURT: Well, you are in trial right now; and you are going to stay in trial.

MR. SHERMAN: I would ask if the Court – would ask the Court to inform the Federal Court judge of my position.

THE COURT: All right.

MR. SHERMAN: Well, if the Court is going to cover for me, well, I am available.

[R.T. Vol. IV, Sec. II, p. 18]

this material has no social value – don't you mean by that

that it has no beneficial value? Isn't that another word for social value?

A Yeah, I think that could be another term for it.

Q And would you agree that a beneficial value could be hedonistic pleasures?

A Well – maybe beneficial immediately, but beneficial in the long run, I don't believe so. I don't believe anybody can have better sex as a result of looking at pictures. They have got to have better sex by having sex.

Q And this might increase their sexual conduct towards each other, mightn't it?

A Yes, but not in a – in a good sort of way.

The love is part of sex pleasure.

Q Didn't you just say that people increase their sex life by having sex? Now, my question is that this may help some people have more frequent sex?

A I meant by having normal sex. I didn't mean by concentrating on one of the partial impulses, which is actually classified as a sexual abnormality.

Q I didn't get that at all. Could you repeat that?

A Well, the certain partial sexual impulses, which a person could get hung up; therefore, it is an

[R.T. Vol. IV, Sec. II, p. 20]

goal, but that is not the long-range tool that you would use. You understand what I mean?

A Well, I wouldn't give an alcoholic morphine because he might get addicted to the morphine; and I would hate to give a person who is having problems with sex this form of sexual relief.

Q Doctor, you know I am not asking for your

analogies and your interpretations of my questions and then putting them into extremes because you don't want to answer the questions. I understand you can make analogies all day long to make my questions look ridiculous. I don't want you to do that, you know, because I am not asking you to make extremes. I am just asking simple questions.

MR. CHATTERTON: Excuse me, your Honor. If he has a legal objection, he can make it without the speech.

THE COURT: Overruled. Go on.

BY MR. SHERMAN: Q Now, my question is isn't a part of therapy to use certain short-ranged tools in going towards a long-range solution?

A That – put it this way. As –

THE COURT: I am going to ask you to either answer that yes or no; and then if you want to explain your answer, you will have the opportunity. Make that a yes or no answer, one way or the other, and then you can explain it.

THE WITNESS: Well, my answer would be no.

BY MR. SHERMAN: Q Your answer would be no?

[R.T. Vol. IV, Sec. II, p. 24]

BY MR. SHERMAN: Q Now, my next question – if you understand what I mean by a short-range method – is if you agree with the principle that sometimes it is beneficial, thereapeutical to use short-range methods to obtain a long-range good –

MR. CHATTERTON: Objection, your Honor. Assumes facts not in evidence.

THE COURT: Overruled.

MR. CHATTERTON: May I explain the nature of my objection?

THE COURT: Yes.

MR. CHATTERTON: He is assuming that shock treatments are a short-range tool, and there has been no evidence to that effect. I think he should find out about that, if there is going to be any indication to them at all.

THE COURT: Same ruling.

BY MR. SHERMAN: Q You may answer, Doctor. Do you understand my question now?

A No, because – see, unfortunately you didn't choose –

THE COURT: Just a moment, if you don't understand it.

MR. SHERMAN: Will you explain it to him?

THE COURT: I think it is about time for recess. We have gone an hour. We will take a recess at this time.

Admonish the jury do not discuss this case,

[R.T. Vol. IV, Sec. II, p. 25]

any feature of it, or any personnel of it involved with others, with anybody. Do not determine any opinion as to any matters that you have heard in this trial.

Take about a 15-minute recess.

Sometime I am going to ask one of the jurors to repeat that. I know you must have memorized it by now.

(Short recess.)

THE COURT: People vs. Miller. Again stipulate that the jury is all present and in their proper places?

MR. SHERMAN: So stipulated, your Honor.

MR. CHATTERTON: Yes.

THE COURT: You may continue.

BY MR. SHERMAN: Q Doctor, it is your opinion,

isn't it, that these pictures are harmful because they create anxieties in people? One of the reasons you feel they are harmful?

A That is one reason, yes, sir.

Q And it creates anxieties in people because you feel that an average person can look at this picture and identify with the people in the pictures?

A This, among other reasons, yes.

Q All right. Now, is it also possible that an average person could look at these pictures and not identify them –

MR. CHATTERTON: Objection. It is irrelevant, your Honor. May I be heard again? I think we are right

[R.T. Vol. IV, Sec. II, p. 26]

back to the same thing the Court ruled on before.

THE COURT: I think the objection is well taken.

BY MR. SHERMAN: [Q] Well, you feel that they are utterly without social redeeming values because they are harmful, don't you?

A I think my answer would be positively yes on that.

Q All right. So they are utterly without social redeeming value because they create anxiety in people, in your opinion, in the average person?

A That's not the only reason. That is one of the reasons.

Q One of the reasons?

A Yes.

Q Now, isn't it a truth that the average person could look at these pictures and not identify them and, therefore, not have the anxiety?

A You are still just referring to this one set of pictures

here?

Q No, just the brochure in general.

A Oh.

Q All the pictures together.

A I think that the average person who looks at those is going to feel anxious and guilty. I don't see any other way out of it.

Q All right. And you feel the anxiety is to

[R.T. Vol. IV, Sec. II, p. 27]

such an extent that this diminishes whatever social value they may have? This makes them utterly without social redeeming value?

MR. CHATTERTON: Excuse me. I will object that he misstates the witness's testimony. He said that one of the reasons that he found it without –

THE COURT: Objection sustained.

BY MR. SHERMAN: Q All right, Professor – or Doctor, there are many other kinds of pictures that create anxiety in people other than pictures that deal with sexual matters, aren't there?

A Very definitely, yes.

Q All right. A person may look at someone stabbing people; and there he might – he might have certain anxiety about that?

A There are some pictures I have seen of stabbing people that make people feel very anxious, yes.

Q All right. And would the same be true of pictures about violence?

A Yes, especially violence.

Q Now, would you say that because pictures about

violence create anxiety in people that, therefore, those pictures become utterly without social value or obscene –

MR. CHATTERTON: Objection, your Honor. It is irrelevant.

[R.T. Vol. IV, Sec. II, p. 28]

THE COURT: Sustained.

BY MR. SHERMAN: Q Well, would they, therefore, be without social redeeming value because they create anxiety also –

MR. CHATTERTON: Objection.

THE COURT: Objection sustained.

MR. SHERMAN: I have no other questions, your Honor.

THE COURT: Okay.

MR. CHATTERTON: I have just one – I have two questions.

Redirect Examination

BY MR. CHATTERTON: Q Number one, other than the fact that those pictures represent or appear to you to have some harmful effect, what other reasons have you considered in forming your opinion that they are without social redeeming value?

A Well, I didn't see any positive values. You mentioned the negative value that I saw. I didn't see positive value in that they would be especially useful in teaching people to have sex or in treating people. I mean, that's just from my own standpoint as a physician. Because of my experience in treating people that have sex problems, I haven't found books and things like that and pictures to be useful.

Q Thank you. And you were asked previously

[R.T. Vol. IV, Sec. II, p. 30]

A That is correct, correct.

MR. SHERMAN: I have no further questions.

THE COURT: That is all, Doctor. Thank you very much.

MR. CHATTERTON: Thank you, Doctor.

People would rest at this time, your Honor.

Excuse me. Were there any other items of evidence which are pending in motion at this time?

THE COURT: I believe Dr. Cee was on the stand.

MR. SHERMAN: Your Honor, may we – of course, I am going to have certain motions to make. Should we put her back on the stand and then take them after the testimony?

THE COURT: Yes.

Caroline C. Sturak,

called as a witness by the Defense, and having been previously duly sworn, was examined and testified as follows:

THE COURT: You have been sworn.

MR. CHATTERTON: I believe, your Honor, that the Court deemed her qualified in all three areas, the prurient interest, the social redeeming value, and the contemporary community standards; is that correct?

THE COURT: Yes.

MR. CHATTERTON: Just for the record, would it be possible to put it on the record in what respect the Court feels that she is competent to testify about prurient interest?

[R.T. Vol. IV, Sec. II, p. 32]

MR. CHATTERTON: Excuse me, your Honor. I am going to object. If the term comparable has a legal definition, I am not sure if that is what Mr. Sherman is getting at or not. If so, it calls for a legal conclusion. It's strictly a legal question, which the Court considers before the admissibility of any evidence.

THE COURT: Objection sustained.

BY MR. SHERMAN: Q Well, Dr. Cee, let me show you the brochures and ask you if in your expert opinion – if you feel these brochures are utterly without social redeeming value?

A I don't think they are utterly without social redeeming value.

Q Can you explain before the jury the basis for your opinion?

A There are specific reasons for each brochure; and I think also the general reason would be that each of the brochures, as they advertise the particular book for sale, tell us – can't help but tell us a great deal about the society from which the books sprung, the culture, the way we live, the place we live, some of our concerns; and that's the general, the main general reason.

Q You made a study, have you not, of the contemporary works that are being written today?

A Yes, I have.

Q And this is your particular area of concern?

[R.T. Vol. IV, Sec. II, p. 33]

A One of my – yes, would be of my feelings.

Q And in doing that study, you had an occasion to see many, many works of art?

A Yes, indeed.

Q Now, I am going to leave aside for a moment the redeeming value of these works and talk about community standards.

Have you formed an opinion as to whether these works go substantially beyond contemporary standards?

A Yes, I have.

Q And what is your opinion?

A That they don't go substantially beyond community standards.

Q And can you explain to us the basis of that opinion?

A Yes. There are books speaking of the graphic material. First of all there are books for sale in legitimate conservative bookstores, which contain not only a good deal of pictures with the same subject matter treated in the same way; but in some cases some of the identical pictures, which are, if not in the brochures, in the books which they advertise.

Q And have you bought such books that depict material similar as this?

A Yes, I have.

Q And have you brought some of those books with

[R.T. Vol. VI, p. 78]

The question is whether we should change exhibited to distributed.

MR. SHERMAN: Yes.

THE COURT: That's all right?

MR. SHERMAN: Yes.

THE COURT: All right. Now, on 77?

MR. SHERMAN: No, on page 76, a definition of knowingly – and I think any definition of knowingly, which is apparently contrary to the Penal Code definition of knowingly, would be improper. This is about – well, the first full paragraph on page 77 – and you will notice that the definition of knowingly on page 76 is having knowledge that the matter is obscene. After the definition of knowingly seems to be drastically altered.

MR. CHATTERTON: There are two cases which support that, your Honor. The Campus is one cited in the instructions. People vs. Pinkus is another one. It is 256 Cal.App.2nd Supp. at 950; both of those cases stand for the proposition that the legislature would not have passed a statute defining knowingly in such terms to be taken literally because it would make the section unprosecutable; that it doesn't come forth with the obvious intention of the legislature.

THE COURT: One question. Were these drawn up after this? Are these two cases drawn up after the definition for obscenity, what is in the code?

MR. CHATTERTON: Yes, your Honor. They both

[R.T. Vol. VI, p. 79]

interpret – they both deal with the definition in the code; that is, they say knowingly. Knowingly means knowing that the matter is obscene; does not mean what it says it means or what it literally says it means. And they do discuss what the legislature intended when they adopted that.

And I might add two things: Number one, that the law was checked to conform with the – more literally with these court decisions; also Smith vs. California, which I am sure the Court is aware of; the case in which the bookseller was being

prosecuted under a Los Angeles Municipal Code, which made the strict liability to sell obscene matter whether the person knew the contents of the book or not. This satisfies Smith vs. California. The only thing that they're really interested in is it that the person has knowledge of the obscene character. He doesn't have to know that it would be found by a court or a jury to be obscene at some subsequent time.

THE COURT: Anything further?

MR. SHERMAN: Only, your Honor, I think the fact the Statute was changed indicates an admission on the part of the legislature that the law was different before the change. I personally haven't read these two cases; but I think since the Statute has a definition of knowledge, which seems to be quite clear, that a judicial interpretation which is contrary to the Statute, would be improper.

THE COURT: Just a moment. That's my understanding.

[R.T. Vol. VI, p. 80]

I will keep that in there as a definition, not as a definition, but as a wording of the courts and their interpretation of the section.

MR. SHERMAN: I would object if you are going to leave that in, "in some manner," and strike those words and "saying and being aware of the obscene character" –

MR. CHATTERTON: I think that comes directly from the case. Might I also add for the record, your Honor, that these instructions, as they sit before you, were the ones approved by the municipal court judges throughout the state; that is, they had their conference, and these are the ones they drew up as being the most accurate in defining and explaining the laws; that it applies to 311.2 under the Statute, which we

are now concerned with now in this trial.

THE COURT: This may be a very critical point to the instructions. You have stated that this is the correct citation and the wording here is in the citation? Now, if that's the case – I am not sure whether I read that case or not – I have read some of them. If you are sure that's in the citation; leave it in; but if it isn't, why it would be a very critical point.

MR. CHATTERTON: I would agree, your Honor. Let me read to the Court and for the Counsel's benefit.

THE COURT: No. You had better read it for your benefit first to yourself; because if you're wrong –

MR. CHATTERTON: Then I had better agree that "in

[R.T. Vol. VI, p. 81]

some matter [*sic*]" come out because here is what the Court says: "Awareness of the contents of a matter in that it is of an obscene character or nature" is all that was intended and all that was in the Constitution required. I take it the three words "in some manner" were the ones that were stricken.

THE COURT: That's what you were asking about?

MR. SHERMAN: I am asking the whole thing go out.

THE COURT: Otherwise it will stay in.

MR. SHERMAN: Did they use the word character? I don't know what that word means either. I think we should have a definition of character.

MR. CHATTERTON: Well, that's something that can certainly be argued. Yes, they use the word obscene character or nature.

THE COURT: Suppose we put it in like that?

MR. SHERMAN: Obscene what?

THE COURT: Character or nature.

MR. CHATTERTON: Yes.

THE COURT: Go to the next page now. 78, first paragraph only stays in.

MR. CHATTERTON: Okay.

THE COURT: And the last one – first paragraph only stays in; second paragraph is omitted.

MR. CHATTERTON: Excuse me. That's the one you crossed out?

THE COURT: Yes.

■

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on SEPTEMBER , 1971, I served the within APPENDIX (Miller v. People - No. 1288) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
600 State Building
Los Angeles, California 90012
(3 copies)

SOLICITOR GENERAL OF
THE UNITED STATES
Washington, D. C. 20543
(3 copies)

DISTRICT ATTORNEY
COUNTY OF ORANGE
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

APPELLATE DEPARTMENT
SUPERIOR COURT OF
ORANGE COUNTY
County Courthouse
Santa Ana, California
(1 copy)

MUNICIPAL COURT - HARBOR
JUDICIAL DISTRICT
567 West 18th Street
Costa Mesa, California 92626
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPT. , 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Calif.
(714) 536-7161

Supreme Court of the United States

No. 1288------ , *October Term, 19* 70

Marvin Miller,

Appellant,

v.

California

APPEAL from the Appellate Department of the Superior Court of California, County of Orange.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 29, 1971

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EX

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.NDIX

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Superior Court of the State of California, County of Orange, entered on October 12, 1970, which affirmed the conviction of appellant in the Municipal Court of the Orange County Harbor Judicial District, State of California. On November 2, 1970, the Superior Court of the State of California, County of Orange, denied appellant's petition for certifica-

tion to the Court of Appeal, Fourth Appellate District, and also appellant's petition for rehearing. (C.T. 280). Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is raised.

OPINIONS BELOW

There were no reported opinions below. We are attaching hereto as an appendix: (1) the decision of the Appellate Department of the Superior Court of the State of California, County of Orange (Appendix p. 1; C.T. 212); (2) notice of denial of appellant's petition for certification to the Court of Appeal, Fourth Appellate District, and the denial of his petition for rehearing (Appendix p. 1; C.T. 280).

JURISDICTION

This was a criminal prosecution wherein, during the course of trial and on appeal, there was drawn in question the validity of the statutes of the State of California as hereinafter noted, on the ground that they were repugnant to the United States Constitution and laws. The affirmation of the judgment of conviction by the Appellate Department of the Superior Court constituted a decision in favor of the validity of the statutes challenged.

The judgment of the Appellate Department of the Superior Court was entered on October 12, 1970 (Appendix p. 1). The timely petition for rehearing was denied on November 2, 1970 (Appendix p. 1). Notice of appeal was filed on November 6, 1970 (Appendix p. 2).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(1), (2). If this is treated as a petition for certiorari, jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Cases which support this appeal are: *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Screws v. United States*, 325 U.S. 91 (1943); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

QUESTIONS PRESENTED

1. Whether in a prosecution for the distribution of obscene printed materials, pursuant to California Penal Code § 311.2, the use of a "state-wide" standard to establish the "customary limits of candor" component of the *Roth-Memoirs*[1] test for obscenity is violative of the First and Fourteenth Amendments.

2. Whether the determination of the "customary limits of candor" of a relevant community, for the purpose of establishing obscenity, if based upon expert opinion which is substantially derived from an unscientifically designed survey which is not purged of economic and ideological bias and which is not administered in such a way as to reflect "state-wide" opinion, is violative of the First and Fourteenth Amendments.

3. Whether the state prosecution under California Penal Code § 311.2 for distributing obscene materials, where the distribution was in fact a "mailing" of the

---

1 *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

materials, constituted a violation of the doctrine of federal pre-emption and was thus in direct conflict with the Supremacy Clause of the United States Constitution.

4. Whether the conviction of appellant for violation of California Penal Code § 311.2 was egregious error because, as a matter of constitutional law, the materials were not obscene.

5. Whether appellant's conviction for mailing obscene material must be reversed under the Fifth Amendment's guarantee against double jeopardy because the state was collaterally estopped from claiming that the material was obscene.

6. Whether the state may convict the appellant under the language of a statute which was amended after the offense for which the appellant was charged took place, and which imposed a *scienter* definition which was easier for the prosecution to establish, without violating the constitutional prohibition against *ex post facto* laws.

STATUTES INVOLVED

Section 311 and 311.2 of the California Penal Code has been set forth in the appendix attached hereto (Appendix p. 5).

STATEMENT OF THE CASE

Appellant was convicted of causing to be mailed obscene matter in violation of California Penal Code Section 311.2. The allegedly obscene matter consisted of five advertising brochures for various books and a movie. The

pictures on the brochures were in no way more explicit than comparative material which was contained in books sold throughout the state of California in reputable bookstores. Some of the pictures on the brochures were identical to those sold in the state. (C.T. 175-176).

The prosecution's witness on the issue of redeeming social value admitted that the materials at issue in this case had "some content" and some usefulness (C.T. 176). The appellant's witnesses both explicitly detailed the value of the materials (C.T. 177).

On the issue of contemporary community standards the prosecution put on only one "expert" witness, a police officer Shaidell who was assigned to the vice division of the Los Angeles Police Department. The officer made no representation that his alleged expertise extended beyond his ability to testify as to community standards in the state of California (C.T. 172-175).

The officer had conducted a "survey" on people's reactions and viewpoint toward obscenity in the state of California (C.T. 173). It is clear that even though officer Shaidell had been a vice officer, his greatest credibility as an expert to speak about "state-wide" standards was based upon the survey which he had conducted. The testimony of officer Shaidell was replete with admissions that pointed to the defectiveness of his survey (C.T. 173-175). The officer was not sure if his survey was even scientific (C.T. 174). Moreover, it was abundantly clear that his method of gathering a cross-section of people to survey was not objective and was decidedly overweighted to show the attitude of groups who would be more likely to have conservative views. Neither did officer Shaidell try to get a balanced

socio-economic representation in his survey. (C.T. 174-175).

Thus, not only was there not a national standard applied to measure "contemporary standards" but even the use of state standards was tainted in this case by the fact that the prosecution's only expert witness on this issue was allowed to bootstrap himself into credibility by relying on the results of a survey which could only muster a pathetic semblance of objectivity.

In fact, the prosecution was never able to produce unequivocal evidence from its own witnesses which would support the conclusion that the materials involved here were obscene (C.T. 174-177).

THE QUESTIONS ARE SUBSTANTIAL

The issues raised by this appeal are not only of importance to this appellant but are of transcendental importance in that they involve important issues as to the distribution of regulatory power between the states and the federal government as well as the issues which go to the very heart of the survival of First Amendment guarantees.

The question as to the appropriate standards to apply in obscenity litigation has been raised myriad times in various courts across the country. Part of the reason for volume of litigation in the area of obscenity is due to the fact that this Court has left open many critical questions. One such open question is whether or not the First Amendment demands the utilization of a national standard for the determination of the "community standards" component of the *Roth-Memoirs* test. In the instant case the need for this Court to announce with unequivocal clarity that only a national

standard is appropriate is especially urgent.

In this case we are dealing with printed materials. It is clear that in such a case only a test of nation-wide uniformity with regard to the "community standards" component of the obscenity test is appropriate. The utilization of any lesser standard raises the constant spector (realized in this case) of a threat to the federal system, by allowing the individual states to interdict the free flow of materials in inter-state commerce, or to affect inter-state commerce in some adverse way. This is an especially important problem due to the great volume of printed material which is in circulation in the country. Thus, we are dealing with a problem that has a considerable impact upon inter-state commerce. See, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520.

The California case of *In re Giannini*, 69 Cal.2d 563 (1968), held that a state-wide standard was appropriate in the determination of obscenity *in the context of live topless dancing*. However, even that court admitted that in the context of books or magazines, a non-national standard could run afoul of the First Amendment (68 Cal.2d at 579). This reflected a sensitivity on the part of the California Supreme Court to the fact that in the realm of printed materials the dictates of federalism and the various emanations of the Supremacy Clause dictated that regional interests yield to national interests.

Later cases in the California appellate courts have not ever held that the state-wide standards made applicable by *Giannini* to live dancing could be transposed to non-live performance contexts. In *People v. Rosakos*, 268 Cal.App. 2d 497, the court reversed a conviction involving photographs

because there had been *no expert testimony adduced at all. Cf. People v. Bonanza Printing Co.*, 271 Cal.App.2d Supp. 871, 874, where the court came to the same result in the context of magazines. In *People v. Cimber*, 271 Cal.App.2d Supp. 869, a conviction involving films was reversed because the expert testified about *local* standards; the court held that this was *too narrow* a standard. The court did not have to decide what the correct standard would be.

The instant case is a paradigm illustration of the intolerable results that can occur when an individual state attempts to deal with the problem of obscenity without a view to the implication its peculiar solution has upon the federal system. Some of these results will be more specifically demonstrated.

First of all, based on the number of *per curiam* reversals by this Court based on *Redrup v. New York*, 386 U.S. 767, it is clear that the materials upon which appellant's conviction rested were no worse than comparable materials which this Court has on numerous occasions found protected. Thus, in this case we have a conviction based on non-obscene materials.

Secondly, under state law, *In re Giannini, supra*, the prosecution was compelled to introduce "expert" testimony as to what the "customary limits of candor" were for the state of California. In this case the expert, who was a vice division police officer, indisputably gathered the greatest part of his credibility and persuasiveness from a survey which he had administered throughout the state. This Court has before sounded a cautionary note when confronted by survey results. *Witherspoon v. Illinois*,

391 U.S. 510, 517-518 (1968). Here, the survey was pathetically inadequate, administered by a police officer who revealed himself as such to the people being questioned, and the large proportion of the survey group consisted of members of fraternal groups and other organizations which had requested that the officer speak on the problem of obscenity. There was therefore a strong likelihood that these people would be less tolerant than the community as a whole. In any case, there is no way of knowing how much weight the jury gave to officer Shaidell's credibility because of the authority of this survey, and in such a case it is hard to say that the introduction of his testimony was harmless error.

Thirdly, the state here convicted the appellant for distribution of allegedly obscene materials, which was effectuated through the mails. It is clear that Congress intended that all prosecutions for the distribution of obscene materials through the mails be controlled by federal law. 18 U.S.C. §§ 1461, 1462, 1465.

Recent decisions of the Court have illustrated the precision that is necessary in laws which seek to penalize an individual for distribution of allegedly obscene materials through the mails. Even obscene materials may, under some circumstances, be permissibly transmitted through the mails.

In the light of a pre-emptive federal plan, as exists in this context, the state of California should not be permitted to erode the Congressional desire for uniformity by the simple expedient of arguing that the state has the power to control "distribution" and that nothing in the state statute explicitly refers to "mailing."

The state is clearly empowered to control the "distribution" of obscene materials within its borders; however, "dis-

tribution" is a portmanteau term which encompasses many possible activities, *e.g.*, mailing, shipping, handing out, etc. Here, we are precisely concerned with an impermissible application of "distribution" so that it can be used to regulate "mailing."

When the federal government has passed legislation which controls one method of distribution, then, to that extent, the federal law pre-empts the state power to adopt or enforce laws which seek to regulate that specific method of distribution.

In addition to the above errors there were several other errors which single this case out as particularly worthy of full review by this Honorable Court.

There was the application of an *ex post facto* law which resulted in the imposition of a different *scienter* requirement on the appellant than the *scienter* test that existed when he committed the allegedly illegal acts. (C.T. 188-189). *Calder v. Bull*, 3 U.S. 386 (1798).

Moreover, the appellant continuously asserted that he was being subjected to double jeopardy in that the state was collaterally estopped from prosecuting him for distributing material which had been previously adjudged to be *not obscene*. *Ashe v. Swenson*, 397 U.S. 436; *Waller v. Florida*, 397 U.S. 387. (C.T. 189-91).

The existence of this *prior* judicial determination of the non-obscenity of the materials involved in this case is not only important *vis-a-vis* the collateral estoppel and double jeopardy issue but is also crucial as regards *scienter*. *Smith v. California*, 361 U.S. 149. If the appellant relies

upon the determination by a court as t
ity of the materials, he cannot later be
scienter that he *knew* the materials wer
such a subsequent conviction would be
First and Fourteenth Amendments.

Appellant contends that the decis
to adequately or correctly deal with th
Appellant feels that the questions pres
are substantial and merit a fuller expos
decisions below are in error and in con
this Court.

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flict with those of

Respectfully

BURTON M
submitted,
MARKS, SH
LONDON
ARKS of
Attorneys f
Petitioner. ERMAN and
or Appellant-

*If this appeal is improvidently take
requested that this statement be trea
certiorari.

, it is respectfully
ed as a petition for

APPENDIX

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., October 12, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP 872 PEOPLE VS MILLER, Marvin

This matter having heretofore been under submission, the Court now rules; the judgment is hereby affirmed and the cause remanded to Municipal Court. ENTERED 10-12-70.

• • •

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., November 2, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP-872 PEOPLE VS MILLER, Marvin

Petition for rehearing and in the alternative, Petition for certification to the Court of Appeal, Fourth Appellate District having been received and considered, the Court now

rules: the Petitions and each of them are hereby denied. ENTERED 11-2-70.

• • •

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT AND APPLICATION FOR STAY PENDING APPEAL

In the Appellate Department of the Superior Court, County of Orange, State of California.

No. AP-872 (Lower Court: OCMC, Harbor No. M50760)

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. MARVIN MILLER, Appellant.

Notice of appeal and application for stay pending appeal to the United States Supreme Court is hereby given by Marvin Miller, Petitioner and Appellant herein, from the Order of this Court dated October 12, 1970, by which it affirmed the judgment of the court below. On November 2, 1970, this Court denied Petitioner/Appellant's Petition for Rehearing and in the Alternative, Petition for Certification to the Court of Appeal, Fourth Appellate District.

This Appeal is taken *inter alia* on the following grounds, without intent to enumerate all of his defenses, that Petitioner/Appellant by his appeal and his Petition for Rehearing/Certification:

1. Challenged the constitutionality of the application of a "state-wide" standard in judging obscenity

under Penal Code § 311.2 under the First and Fourteenth Amendments;

2. Challenged the constitutionality of the application of an unscientific survey to qualify an expert witness to testify as to the "community standards" requirement in the legal definition of obscenity pursuant to Penal Code § 311.2 in contravention of the First and Fourteenth Amendments;

3. Challenged the prosecution under Penal Code § 311.2 for mailing obscene material as a contravention of the doctrine of Federal Pre-emption and the Supremacy Clause of the United States Constitution;

4. Challenged his conviction under the amended language of Penal Code § 311. as an application of an *ex post facto* law;

5. Challenged his prosecution and conviction for mailing obscene material in that under the Fifth Amendment's prohibition against double jeopardy the state was collaterally estopped from claiming that the material was obscene.

This appeal is being prosecuted pursuant to the authority of Title 28 U.S.C. § 1257(2), and

That the Order of this Court, dated October 12, 1970, and reading as follows: "Affirmed," and the denial of Appellant's Petition for Rehearing/Certification constituted a finding that Penal Code § 311.2 of the State of California was constitutional on its face and as applied, and Appellant

hereby gives his Notice of Appeal from that finding.

DATED: November 6, 1970.

MARKS, SHERMAN & LONDON

BY: BURTON MARKS

Attorneys for Appellant

[PROOF OF SERVICE BY MAIL annexed, showing service on the Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

CECIL HICKS,
District Attorney
P. O. Box 808
Santa Ana, Calif.

MUNICIPAL COURT OF THE ORANGE COUNTY JUDICIAL DISTRICT - HARBOR
567 West 18th Street
Costa Mesa, California 92626.

Executed on November 6, 1970, at Beverly Hills, California.]

• • •

§ 311. Definitions

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm,

association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to:

A motion picture machine operator acting within the scope of his employment as an employee of any person exhibiting motion pictures pursuant to a license or permit issued by a city or county provided that such operator has no financial interest in his place of employment, other than wages.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JANUARY 28 1971, I served the within JURISDICTIONAL STATEMENT on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
600 State Building
Los Angeles, California 90012
(3 copies)

SOLICITOR GENERAL OF
THE UNITED STATES
Washington, D. C. 20543
(3 copies)

DISTRICT ATTORNEY
COUNTY OF ORANGE
700 Civic Center Drive West
Santa Ana, Calif. 92701
(1 copy)

APPELLATE DEPT.
SUPERIOR COURT
ORANGE COUNTY
County Courthouse
Santa Ana, California
(1 copy)

MUNICIPAL COURT
HARBOR JUDICIAL DISTRICT
567 West 18th Street
Costa Mesa, California 92626
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 28th 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

*D. A. Standefer

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1970
No. .....

MARVIN MILLER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Appeal From the Appellate Department of the Superior Court of the County of Orange State of California.

MOTION TO DISMISS APPEAL.

Respondent moves the Court to dismiss the Appeal herein on the grounds that no substantial Federal Question is presented by the appeal. It moves the Court to deny the petition for certiorari for lack of jurisdiction on the following grounds:

1. Petitioner's contention that California Penal Code Section 311.2 requires the use of a "state-wide" standard in all instances is incorrect. Where materials are intended for wider distribution the standard to be applied under California Law is the national standard.
2. The determination of the "Customary limits of candor" of the community made by the court and the jury was based upon properly admitted evidence of community standards.

3. The prosecution of Petitioner was based upon Petitioner's distribution of obscene matter within the county of Orange, California and presents no preemption issue.
4. Petitioner-Appellant has never entered a double jeopardy plea in this case. Moreover, no double jeopardy issue is involved.
5. The amended California Statute was never invoked against Appellant-Petitioner.
6. The materials involved are not protected by the First Amendment as a matter of law.

ARGUMENT.

I.

The California Obscenity Law Does Not Require the Application of "State-Wide" Standards to Materials Intended for Nation Wide Publication.

In *In re Giannini*, 69 Cal. 2d 563, the California Supreme Court set forth the necessity for proof of state wide community standards in cases involving stage performances by dancers. That court, however, was careful to caution:

> The strongest argument in support of a national community, that a non-national standard would produce the "intolerable consequence of denying some sections of the county access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency" (*Manual Enterprises v. Day, supra*, 370 U.S. 478, 488 [9 L. Ed. 2d 639, 647]), does not apply with any force to the instant fact situation. Evaluation of "speech" that is designed for nationwide dissemination, such as books or films, according to a non-national community standard might well unduly deter expression in the first instance and thus run afoul of First Amendment guarantees. But we need not, in the instant case, reconcile this contention with the practical problems of producing evidence of national standards. Iser's dancing is purely local in nature, a subject matter obviously not intended for nationwide dissemination. Since the decision as to whether to stage a "topless" dance rests solely on local considerations, the problem that unduly restrictive local standards may interfere with dissemination of and "access to [such] material" as books or film does not arise in the instant case.

II.

The Court and Jury Had Before Them Evidence From Which They Could Properly Determine That the Materials Went Beyond the "Standard" Limits of Candor of the Community.

Later cases in the appellate courts have held that the *Giannini* standards and requirements are applicable in non-live performance cases. They have never, however, determined whether the standard in those cases is state-wide or nation-wide. *People v. Rosakos*, 268 Cal. App. 2d 497 (1968) reversed a conviction for exhibiting obscene *photographs* because no expert had testified to community standards as required by *In re Giannini*. *People v. Cimber*, 271 Cal. App. 2d Supp. 869 (1969) reversed a conviction for exhibiting obscene *films* because the community testified about *by* the expert was local. *People v. Bonanza Printing Co.*, 271 Cal. App. 2d Supp. 871 at 874, (1969) merely suggests that *magazines* are to be tested by the rules set down in *In re Giannini*.

In the case at hand Appellant never showed that the advertising brochures which were the basis for the prosecution were intended for nation-wide distribution rather than local distribution. Moreover, the People introduced as their expert Doctor Donald Albert Sears, Professor of English, California State College at Fullerton, Fullerton, California 92631, and the record shows his qualifications to be as follows: B.A. *magna cum laude*, Bowdoin College, 1944; A.M., Harvard University, 1947; Ph.D., *ibid.*, 1952. Instructor, Dartmouth College, 1948-52; Assistant to Professor, Upsala College, 1952-62; Director of Freshman English, *ibid.*, 1953-60; Associate Director of Development, *ibid.*,

1961-62; Professor and Chairman of English, Skidmore College, 1962-64; Staff. Assoc., American Council on Education, Washington, D.C. 1964-65; Professor of English, Howard University, 1965-66; Chair of English, Ahmadu Bello University, Kano and Zaria, Northern Nigeria, 1966-67; Professor of English, California State College at Fullerton, 1967; Hon. Pos.: Visiting Professor, University of Massachusetts, 1957. Mem.: College English Association; Modern Language Association; Executive Director, College English Association, 1962-; Editor, The CEA Critic, 1960-; Director, Book-of-the-Month Club Writing Fellowship Program; 1965-; Milton Soc.; Malone Soc.; Shakespeare Soc.; Phi Beta Kappa; Contbr. to: New England Quarterly; Proc. of Modern Language Association; The CEA Critic; Good Reading; Western Review. Author: The Harbrace Guide to the Library and Research Paper, 1956, 1960; The Discipline of English, 1963; The Undergraduate and Graduate School, Part 1 of A Guide to Graduate Study, 1965. Co-Author: The Sentence in Context, 1960. U.S. Army, Air Corps, 1943-46, 1950. Gen. Int.: Rec., Lindback Fdn. Award for Distinguished Tchng., 1961; Hon. Life Mem., Me. Hist. Soc., 1963; Hon. Life Mem., College English Association of Indiana. Listed in Directory of American Scholars; Contemporary Authors; Who's Who in the South; Who's Who in American Education.

Professor Sears over a two day period was questioned at length not only as to the value of the material but as to the existence of other similar depictions in art and in Literature. From his testimony and his background the jury could well and properly conclude that the materials went beyond what was being and had been published on a nation-wide basis as well as that the material had no social redeeming value.

Additionally the Respondent presented the expert evidence of Sargeant Shaidell of the Los Angeles Police Department.

Appellant attacks the testimony of Officer Shaidell by assuming an invalid premise, *i.e.*, that Officer Shaidell's qualifications set only from a survey. Officer Shaidell testified as follows:

1. In the last six years he had reviewed approximately 100,000 communications from members of the public dealing with materials involving sex and nudity. The bulk of those communications involved materials sent through the mail. [R.T. Vol. III, Section I, p. 115, lines 3-24, p. 116, lines 3-9.]

2. He is in constant contact with law enforcement personnel who tell him the complaints they have received. [R.T. Vol. III, Section I, p. 124, lines 9-26; p. 125, line 1; p. 126, lines 5-8.]

3. He is a participant in the League of Cities. [R.T. Vol. III, Section I, p. 127, lines 3-16.]

4. He has traveled throughout the state and observed what was being offered to the public. [R.T. Vol. III, Section 1, p. 129, lines 15-23.]

5. He is familiar with the Gallup Poll's survey concerning the same subject matter. [R.T. Vol. III, Section I, p. 128, lines 4-11 and 18-26; p. 129, lines 1-3.]

It should be further noted that he has qualified as an expert on 26 prior occasions. [R.T. Vol. III, Section I, p. 130, lines 4-26; p. 131, lines 1-3.]

In addition to the above, Officer Shaidell and others conducted a survey throughout the state. The questionaire used was prepared by Shaidell and members of the

Department of Justice; reviewed by 15 deputy District Attorneys; submitted to a committee of the Attorney General; and also reviewed by two marketing professors at U.C.L.A. [R.T. Vol. III, Section 2, p. 15, lines 6-18; p. 8, lines 1-4.] It was taken to 18 of the State's 58 counties. Those counties represent 90% of the State's population. [R.T. Vol. III, Section 2, p. 20, lines 15, 16.] There were 1,902 people surveyed; 105 different occupations.

In light of the above qualifications, can there be any doubt that Officer Shaidell had some special knowledge that could aid the jury?

III.

Federal Law Has Not Pre-empted the Field of Distributing Obscene Matter.

Many cases have recognized the validity of state statutes controlling the circulation of obscenity. *Mishkin v. New York,* 383 U.S. 502, 86 S. Ct. 958; *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215; *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304; and *Marvin Miller v. Reddin,* 293 F. Supp. 216.

California law does not infringe upon federal statutes prohibiting the mailing of obscene matter. It does not even mention mailing; it does, however, prohibit the transfer or distribution of obscene matter. And, in the present case, the fact the matter was sent through the mails is incidental to the case. The fact that Mr. Miller made the U.S. Post Office his agent for distribution does not exempt him from responsibility under California law, and no case cited by appellant even remotely suggests such exemption.

IV.

There Was No Violation of Appellant's Right to Be Free From Double Jeopardy.

Appellant's plea was "not guilty." If his contention was former jeopardy, his plea was not in accordance with California Penal Code Section 1017. However, when the plea of former jeopardy is not made before the trial court, it cannot be raised for the first time on appeal. *People v. Martinson,* 179 Cal. App. 2d 164; *People v. Fairchild,* 254 Cal. App. 2d 831.

Finally, the case which appellant cites apparently did not go to *trial,* and did not involve the brochures mailed to the Orange County victim.

V.

The Amended California Statute Was Never Invoked Against Appellant.

In the instant case, the trial court instructed the jury according to the law as it existed at the time of the offense. The court did not use Penal Code Section 311(e) as it presently exists; rather, it instructed the jury as follows:

> "Knowingly means having knowledge that the matter is obscene." The word "knowingly" as used in these instructions, imports a knowledge of the contents of the material, and being aware of its obscene character or nature. (*People v. Campise,* 242 A.C.A. 713.)

There was a lengthy, in chambers discussion, prior to instructions being given that shows the reasons for the instruction. [R.T. Vol. VI, pp. 78-81, lines 1-18.]

In addition, it should be noted that the trial court gave an instruction that benefited the appellant more than the alleged instruction could have prejudiced him. It read as follows:

> In order to find the defendant guilty you must find beyond a reasonable doubt and to a moral certainty that said defendant knew not only the contents of the brochures, but that he also knew they appealed to a prurient interest in sex, that they went substantially beyond contemporary standards of candor in sexual matters and that they were utterly without redeeming social value. (Defendant's proposed jury instruction No. K—given as modified.)

VI.

The Materials Involved Are Not Protected As a Matter of Law.

The materials involved are a collection of depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more. Doctor Wagner, a psychiatrist, testified that the material appealed to the prurient interest. Doctor Sears testified that the material had no literary or artistic value and to the standard of the materials as compared to other books and paintings. Sergeant Shaidell testified that the materials went far beyond the limits of candor of the community of the State of California. The jury was, therefore, entitled to accept their testimony rather than the testimony of appellant's two witnesses whose qualifications the jury obviously did not find as comprehensive. This the jury did and found the appellant guilty.

For all the above reasons, respondent urges this Honorable Court to deny review under 28 U.S.C. 1257 and if treating the appeal as a petition for certiorari to deny the writ.

Dated this 24th day of February, 1971.

Respectfully submitted,

CECIL HICKS,
District Attorney,
County of Orange,
State of California,

MICHAEL R. CAPIZZI,
Deputy District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,

Attorneys for Respondent.

Verification.

State of California, County of Orange—ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that my business address is Post Office Box 808, Santa Ana, California, 92701; that on February 24, 1971, I served the within Motion to Dismiss Appeal on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Santa Ana, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
600 State Building
State of California
Los Angeles, California 90012
(3 copies)

APPELLATE DEPT. SUPERIOR COURT
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

SOLICITOR GENERAL OF THE
UNITED STATES
Washington, D. C. 20543
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MUNICIPAL COURT
ORANGE COUNTY HARBOR DISTRICT
567 West 18th Street
Costa Mesa, California 92626
(1 copy)

BURTON MARKS
MARKS, SHERMAN and LONDON, A Professional Corporation, 9720 Wilshire Boulevard,
Beverly Hills, California 90212 (1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 1971, at Santa Ana, California.

HORTENSIA J. ROBERSON

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 1288

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.

BRIEF FOR PETITIONER

OPINIONS BELOW

There were no reported opinions below. We are attaching hereto as an appendix:

1. The decision of the Appellate Department of the Superior Court of the State of California, County of Orange

(CT 212)*;

2. Notice of Denial of Appellant's Petition for Certification to the Court of Appeal, Fourth Appellate District, and the Denial of his Petition for Rehearing (CT 280).

JURISDICTION

This was a criminal prosecution wherein, during the course of trial and on appeal, there was drawn a question of the validity of the statutes of the State of California as hereinafter noted, on the ground that they were repugnant to the United States constitutional laws. The affirmation of the judgment of conviction by the Appellate Department of the Superior Court constituted a decision in favor of the validity of the statutes challenged.

The judgment of the Appellate Department of the Superior Court was entered on October 12, 1970. The timely Petition for Rehearing was denied on November 2, 1970. Notice of Appeal was filed on November 6, 1970. Probable jurisdiction was noted by this Court on March 29, 1971.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(1)(2). Cases which support this appeal are: *Giaccio v. Pennsylvania*, 382 U.S. 399, (1966); *Screws v. United States*, 325 U.S. 91, (1943); *Lanzetta v. New Jersey*, 306 U.S. 451, (1939); *Connally v. General Construction Co.*, 269 U.S. 385, (1926).

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*(CT refers to Clerk's Transcript.)

QUESTIONS PRESENTED

1. The courts below have construed California Penal Code Section 311.2 to allow the use of a "statewide" standard to establish the "contemporary community standards" component of the *Roth-Memoirs*[1] test for obscenity, in a prosecution for distributing allegedly obscene printed material. The questions presented are: Whether under the First and Fourteenth Amendments a "national standard" is a necessary criterion for establishing "contemporary community standards."

2. Whether under the Commerce Clause of the United States Constitution, a "national standard" is necessary in order to avoid unconscionable burdens on the free flow of interstate commerce.

3. Whether the state prosecution under California Penal Code Section 311.2 for "distribution," where the distribution was in fact a "mailing" of the materials, constituted a violation of the doctrine of federal pre-emption and was thus in direct conflict with the Supremacy Clause of the United States Constitution.

4. Whether the determination of the "customary limits of candor" of a relevant community, for the purpose of establishing obscenity, if based upon expert opinion which is substantially derived from an unscientifically designed survey which is not purged of economic and ideological bias, is violative of the First and Fourteenth Amendments.

5. Whether the conviction of petitioner for violation

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1 *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

of California Penal Code Section 311.2 was egregious error because, as a matter of constitutional law, the materials were not obscene.

6. Whether the state may convict petitioner under the language of a statute which was amended after the offense for which the petitioner was charged took place, and which imposed a *scienter* definition which was easier for the prosecution to establish, without violating the constitutional prohibition against *ex post facto* law.

STATUTES INVOLVED

Sections 311 and 311.2 of the California Penal Code have been set forth in the appendix attached hereto.

STATEMENT OF THE CASE

Petitioner was convicted of causing to be mailed obscene matter in violation of California Penal Code Section 311.2. The allegedly obscene matter consisted of five advertising brochures for various books and a movie. Pictures on the brochures were in no way more explicit than comparative material which was contained in books sold throughout the state of California in reputable book stores. Some of the pictures on the brochures were identical to those sold in the state. (CT 175, 176.)

The prosecution's witness on the issue of redeeming social value admitted that the materials at issue in this case had "some content" and some usefulness (CT 176). The petitioner's witnesses both explicitly detailed the value of the materials (CT 177).

On the issue of contemporary community standards, the prosecution put on only one "expert" witness, a police officer, Shaidell, who was assigned to the Vice Division of the Los Angeles Police Department. The officer made no representation that his alleged expertise extended beyond his ability to testify as to community standards in the state of California (CT 172-175).

The officer had conducted a "survey" on people's reactions and viewpoints towards obscenity in the state of California (CT 173). It is clear that even though Officer Shaidell had been a vice officer, his greatest credibility as an expert to speak out on "statewide" standards was based upon the survey which he had conducted. The testimony of Officer Shaidell was replete with admissions that pointed to the defectiveness of his survey (CT 173-175). The officer was not sure his survey was even scientific (CT 174). Moreover, it was abundantly clear that his method of gathering a cross-section of people to survey was not objective and was decidedly overweighted to show the attitude of groups who would be more likely to have conservative views. Neither did Officer Shaidell try to get a balanced socio-economic representation in the survey (CT 174-175).

Thus, not only was there not a national standard applied to measure "contemporary standards," but even the use of state standards was tainted in this case by the fact that the prosecution's only expert witness on this issue was allowed to bootstrap himself into credibility by relying on the results of a survey which could only muster a pathetic semblance of objectivity.

In fact, the prosecution was never able to produce unequivocal evidence from its own witnesses which would

support the conclusion that the materials involved here were obscene (CT 174-177).

SUMMARY OF THE ARGUMENT

1. That part of the decision of *Roth v. United States, supra,* requiring as a necessary component of the definition of obscenity that the material go beyond "contemporary community standards," has been unmodified by subsequent decisions of this Court. The majority of the states which have attempted to decide whether the "community" referred to in *Roth* required a "national" or a "statewide" standard, have followed the lead of Justice Brennan's decision in *Jacobellis v. Ohio,* 378 U.S. 184, 192-193, and have concluded that a "national" standard is necessary. The time has passed since we can indulge the fantasy that, with regard to precious First Amendment guarantees, this Court meant that the word "community" was to be understood in its most parochial sense. As a "preferred" right, the First Amendment guarantee of freedom of expression must be protected from erosion, by demanding that any state's regulation of obscenity be restricted to the least detrimental of reasonable alternatives open to the state. In this case, both the state's interest in protecting the morals and general welfare of its citizens, as well as the constitutional interest in promoting freedom of expresson, can both be best served by adopting a "national standard."

2. Separate and apart from the dictates of the First and Fourteenth Amendments is the question of the impact of the Commerce Clause upon the question of which "standard" is the most appropriate. There can be no doubt that

the emanantions of the Commerce and Supremacy Clauses are instrumental to the preservation of federal interests from encroachments by the states. Where, as here, we are dealing with printed materials that can be nationally distributed, it is clear that any control of such material raises issues pertinent to the Commerce Clause. The sales of printed materials, as well as the sheer volume of pamphlets, books, magazines, etc., which are in circulation throughout the country, indicate that this is an area of sizable impact upon interstate commerce. Were the individual states allowed to curtail distribution, circulation or entry of printed materials into or within their borders, through the imposition of "state standards" for defining obscenity, then there would be an unconscionable deleterious effect upon interstate commerce. Thus, the effect of the Commerce Clause, acting independently of the First Amendment, requires the adoption of the "national standard."

3. The petitioner was convicted for the distribution of allegedly obscene materials, which was effectuated through the mails. It is clear that Congress intended that all prosecutions for the distribution of obscene materials through the mails be controlled by federal law. 18 U.S.C. Sections 1461, 1462, 1465. Recent decisions of the Court have illustrated the precision that is necessary in laws which seek to penalize an individual for distribution of allegedly obscene materials through the mails. Even obscene materials may, under some circumstances, be permissibly transmitted through the mails. In the light of a pre-emptive federal plan, as exists in this context, the state of California should not be permitted to erode the constitutional desire for uniformity by the simple expedient of arguing that the state has the

power to control "distribution" and that nothing in the state statute explicitly refers to "mailing." The state is clearly empowered to control the "distribution" of obscene materials within its borders; however, "distribution" is a portmanteau term which encompasses many possible activities, e.g., mailing, shipping, handing out, etc. Here, we are precisely concerned with an impermissible application of "distribution" so that it can be used to regulate "mailing." When the federal government has passed legislation which controls one method of distribution, then, to that extent, the federal law pre-empts the state power to adopt or enforce laws which seek to regulate that specific method of distribution.

4. The California State Supreme Court, in the case of *In re Giannini*, 69 Cal.2d 563 (1968), stated that the prosecution was compelled to introduce "expert" testimony as to what the customary limits of candor were for the state of California. In this case, the expert, who was a Vice Division police officer, indisputedly gathered the greatest part of his credibility and persuasiveness from a survey which he had administered throughout the state. This Court has before sounded a cautionary note when confronted by survey results. *Witherspoon v. Illinois*, 391 U.S. 510, 517-518 (1969). Here, the survey was pathetically inadequate, administered by a police officer who revealed himself as such to the people being questioned, and the large proportion of the survey group consisted of members of fraternal groups and other organizations which had requested the officer speak on the problem of obscenity. There was therefore a strong likelihood that these people would be less tolerant than the community as a whole. In any case,

there is no way of knowing how much weight the jury gave to Officer Shaidell's credibility because of the authority of the survey, and in such a case it is hard to say that the introduction of his testimony was harmless error.

5. Based on the number of per curiam reversals by this Court based on *Redrup v. New York*, 386 U.S. 767, it is clear that the materials upon which petitioner's conviction rested were no worse than comparable materials which this Court has, on numerous occasions, found protected. Thus, in this case, we have a conviction based on non-obscene material. Moreover, due to the defectiveness of the expert witness in this case, it is clear that the prosecution did not even establish the requisite elements necessary for the definition of obscenity as articulated in *Roth-Memoirs, supra*.

6. Petitioner was indicted and convicted under the language of California Penal Code Section 311(e), which was amended after the time that the offense charged took place. The new language of the Penal Code altered the "*scienter*" requirement so as to make it easier for the prosecution to establish its case. This application of the language of the subsequently amended Penal Code was the imposition of an *ex post facto* law and, hence, unconstitutional. *Calder v. Bull*, 3 U.S. 386 (1798).

ARGUMENT

I

Whether In A Prosecution For The Distribution Of Obscene Printed Materials, Pursuant To California Penal Code Section 311.2, The Use Of A Statewide Standard To Establish Contemporary Community Standards Component Of The *Roth-Memoirs* Test For Obscenity Is Violative Of The First And Fourteenth Amendments.

In *Roth v. United States*, 354 U.S. 476, this Court stated that material is obscene if, applying contemporary community standards, the dominant theme of the materials, taken as a whole, appeals to prurient interest. *Id.* at 489.

Although a plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413, 418, attempted to modify the *Roth* test as follows:

> ". . . Three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matter; and (c) the material is utterly without redeeming social value."

(see, also, *Redrup v. New York*, 386 U.S. 767, 770-771), it is clear that the concept of contemporary community standards is an essential component for the definition of obscenity under either test.

In the case of *In re Giannini*, 69 Cal.2d 563, 574, the

California Supreme Court interpreted the words "customary limits of candor," as used in Penal Code Section 311, to require a showing that the material affronts contemporary community standards of decency, i.e., the California court equated the language of Penal Code Section 311 to the requisite enunciated in *Roth, supra,* and reiterated in *Memoirs, supra.*

Moreover, the *Giannini* court held that in order to support a conviction, the prosecution must introduce expert testimony upon the elements of "community standards."[2]

Here, on the issue of contemporary community standards, the prosecution put on only one expert witness, a police officer, Shaidell. The officer made no representation that his alleged expertise extended beyond his ability to testify as to the community standards in the state of California (CT 172-175). It is petitioner's contention on appeal that the application of Penal Code Section 311 and Section 311.2 to permit a statewide standard rather than a national standard to measure and establish whether printed material affronts contemporary community standards of decency is violative of the First and Fourteenth Amendments.

(A) Mr. Justice Harlan pointed out in *Manual Enterprises v. Day,* 370 U.S. 478, at 488, that a standard based

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2 *Cf., Smith v. California,* 361 U.S. 147, 180 (J. Frankfurter, concurring); *United States v. Klaw,* 350 F.2d 155 (2d Cir. 1966); *House v. Commonwealth,* 210 VA. 121, 169 S.E.2d 572; *Duggan v. Guild Theatre, Inc.,* 436 Penn. 191, 258 A.2d 858; *Dunn v. State Board of Censors,* 240 MD. 249, 213 A.2d 751; *Hudson v. United States,* D C App., 234 A.2d 903; *Ramirez v. State,* 430 P.2d 826; *City of Phoenix v. Fine,* 4 Arizona App. 303, 420 P.2d 26; *In re Seven Magazines,* 268 A.2d 707.

on a particular local community would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Cf. Butler v. Michigan,* 352 U.S. 380.

That observation, as to the deleterious consequences of employing any standard less than a national standard, is the crucial starting point from which all analysis must commence. Justice Harlan finds that in the context of federal statutes the national standard is compelled because of the unremitting dictates of the First Amendment. However, in the context of state statutes, less than a national standard is permissible, notwithstanding the same deleterious effect stated, because the First Amendment is made applicable to the states through the Fourteenth Amendment and the word "liberty" in the Fourteenth Amendment incorporates only as much of the restraints contained in the particular amendment as is essential to the concept of "ordered liberty." *Palko v. Connecticut,* 302 U.S. 319 (1937).

Justice Brennan has of course presented the major defense for the proposition that the only relevant community is the "national" community. *Jacobellis v. Ohio,* 378 U.S. 184, 192-193.[3]

Thus, at its simplest formulation, the dispute comes down to whether the First Amendment demands a rule of uniform application irrespective of state lines,

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3 45 Minnesota Law Review at 108-112; ALR, Proposed Official Draft (May 4, 1962) Section 251.4(4)(d); Tentative Draft No. 6 (May 6, 1957) at 45.

Pennekamp v. Florida, 328 U.S. 331, 335, or whether a residual police power of the various states is to be the predominating influence so long as it is exercised within the perimeters circumscribed by the Due Process Clause of the Fourteenth Amendment.

It is clear that under *Roth, supra,* and *Memoirs, supra,* the classification of material as obscene, under either test, is dispositive of the constitutional issue. That classification is of course to be made by the original trier of fact at the trial level. Now, to the extent that reviewing courts are deferential to that original judgment, by adopting non-stringent standards of review, the courts will encourage easy labeling and jury verdicts rather than compelling a facing up to the difficult individual problems of constitutional judgment involving every obscenity case. *Roth, supra,* 354 U.S. at 497.

Thus, the majority opinion in *Roth, supra,* only retains vitality and believability as long as this Court continues to scrupulously scrutinize lower court judgments in obscenity prosecutions. Justice Brennan, in *Jacobellis, supra,* 378 U.S. at 190, note 6, stated:

> "Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a 'sufficient evidence' standard of review. Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require *de novo* review. *Ng Fung Ho v. White,* 259 U.S. 276, 284-285; *Crowell v. Benson,* 285 U.S. 22, 54-65."

It seems manifestly clear that this Court, when making its *de novo* determination as to the obscenity *vel non* of materials, employs a national standard as the criterion for community standards. See *Redrup v. New York, supra,* and the subsequent *per curiam* reversals based on *Redrup.*

It makes little sense to allow lower courts to arrive at a determination of obscenity based on "statewide" standards and then have this Court, upon the final review, employ a different standard, i.e., a national standard.

(B) Moreover, the argument is not ultimately persuasive that this Court, when it articulated the First Amendment definition of obscenity, *Roth, supra,* meant the word "community" to refer to anything less than a national community. See *Jacobellis, supra,* 378 U.S. at 192-193.

A canvassing of the decisions of various state supreme courts indicates that many, on their own initiative, without clear and unequivocal statements by a majority of this Court, have felt obliged to adopt the "national standard" test.[4]

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4 *Robert Arthur Management v. Tennessee,* 414 S.W.2d 638 (1967) [Tenn. Supreme Court]; *State v. Smith,* 422 S.W.2d 50 (1967) [Mo. Supreme Court]; *State v. Hudson County News Company,* 41 N.Y. 247, 262-266 (1963) [N.J. Supreme Court]; *In re Seven Magazines, supra,* 268 A.2d 707, 709 (1970) [R.I.Supreme Court]; *State Ex Rel v. A Quantity of Copies of Books,* 197 Kans. 306, 310 [Kans. Supreme Court]; *People v. Stabile,* 58 Misc. 2d 905 (1969) [N.Y. Supreme Court]; *State v. Childs,* 252 Ore. 91, 98 (1968) [Oregon Supreme Court suggested national standard]; *Duggan v. Guild Theatre, Inc., et al.,* 436 Pa. 191, 201, n. 7 (1969) [Pennsylvania Supreme Court indicates national standard]; see, also, *Interstate Cir., Inc. v. City of Dallas,* 402 S.W.2d 707 [Texas Court of Appeals suggests national community]; *Hudson v. United States,* 234 A.2d 903 [D.C. Appellate, 1967, suggests national community]. But, *cf., Gent v. State,* 393 S.W.2d 219 (1965) [Ark. Supreme Court indicates *local standard,* i.e., city]; *City of Youngstown v. DeLoreto,* 251 N.E.2d 491 (1969) [Ohio Court of Appeals suggests *state standard*].

When this Court has recognized fundamental rights in the Fourteenth Amendment *without* specific reliance upon the Bill of Rights, the language of "community" (and analogous expressions) was clearly meant to refer to a "national community."[5] It seems therefore, *a fortiori*, that where, as here, the Fourteenth Amendment makes applicable the First Amendment to the states, which is after all a "preferred right," the term "community" must also be understood to mean a national community.

(C) It is also important for this Court to reach a decision which provides the greatest degree of adaptability and utility to the emerging and progressive tendencies of our society. It is clear that the trend in our society is toward greater proliferation, both of data and of artistic and marginally artistic works. Moreover, the trend is also towards greater access to data through retrieval systems and channels of mass media, and wider and speedier dissemination of printed, written and cinematic materials of all kinds.

The countenancing of a "state standard" by this Court simply permits the least progressive sections of our country to resist and impede change, and to prohibit other members of the society–unfortunate enough to reside in those regressive areas–the opportunity to avail themselves of materials tolerated by the rest of the nation.

Thus, the adoption of a state standard by this Court would have the unfortunate tendency of impeding

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5 *Rochin v. California*, 342 U.S. 165; *Snyder v. Massachusetts*, 291 U.S. 97; *Malinski v. New York*, 324 U.S. 401, 417; *Haley v. Ohio*, 332 U.S. 596, 604; *Wolf v. Colorado*, 338 U.S. 25; *Betts v. Brady*, 316 U.S. 455; *Griswold v. Connecticut*, 381 U.S. 479.

the desirable evolutionary tendency in our society towards the permitting of greater access and utilization of the most current thoughts and works produced in our country, or, for that matter, in the world.

II

The Use Of A Statewide Standard In The Application Of Penal Code Section 311.2 To A Prosecution For Distributing Purportedly Obscene Printed Materials Was In Violation Of Article I, Section 8, Of The United States Constitution.

Under Article I, Section 8, Clause 3, Congress was granted the power "to regulate commerce . . . among the several states . . . ."

Petitioner contends that the application of a statewide standard to determine community standards, in the application of Penal Code Section 311.2, conflicts with the free flow of commerce throughout the United States and, therefore, this application by the State of California of Penal Code Section 311.2 must be avoided because of its collision with the Commerce Clause.

It is indisputable that the application of a statewide standard by California in pursuance of Penal Code Section 311.2 has an impact on interstate commerce. Books, films, magazines, etc., which are capable of transportation from state to state, would have to be altered in order to conform to the "state" standard in order to avoid prosecution; alternatively, a wholesaler or distributor or exhibitor would have to forebear dealing with certain books or films, etc. This application of Penal Code Section 311.2 thus has

a sufficient impact on the flow of commerce so as to bring it within the purview of the Commerce Clause, even though the application has an indirect effect.

> "Although the Commerce Clause conferred on the national government the power to regulate commerce, its possession of the power does not exclude all state power of regulation . . . . In the absence of conflicting legislation by Congress, there is a residual power in the states to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent regulate it . . . . But, ever since *Gibbon v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.*"
>
> *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (Emphasis added).

The states are not wholly precluded from exercising their police power in matters of local concern, even though they may thereby affect interstate commerce. *Edwards v. California*, 314 U.S. 160, 172-173.

The precise degree of the permissible restriction on state power cannot be fixed generally, or, indeed, not even for one kind of state legislation, such as taxation or health or safety. *Morgan v. Virginia*, 328 U.S. 373, 377. Generally, the courts have been willing to uphold state regulations

designed for the protection of public health and welfare, even though these regulations have some affect on interstate commerce. Of course, *the burden must nevertheless be found not to be unreasonable. Head v. New Mexico Board of Examiners,* 374 U.S. 424.

Thus, state legislation is invalid if it unduly burdens interstate commerce in matters where uniformity is necessary–necessary in the constitutional sense and useful in accomplishing a permitted purpose. *Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 766-771; *Morgan v. Virginia, supra,* 328 U.S. at 377; *Cooley v. Board of Wardens,* 12 Hod. 299, 319.

As a general proposition, it can be said that because of the nature of the federal system and the emanations from the Supremacy Clause (see *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316), even where Congress has not acted, the Commerce Clause still prohibits the states, through the exercise of their police power, to impose directly or indirectly an "unreasonable burden" on interstate commerce. *Cooley v. Board of Wardens, supra; South Carolina Highway Department v. Barnwell Bros.,* 303 U.S. 177, 184; *Southern Pacific Co. v. Arizona, supra.* Obviously, the states may impose some burden on the flow of commerce. The question is always whether in the individual instance the burden imposed is so great as to be unreasonable. The court must utilize the balancing of interests. It must balance, on the one hand, the policies and benefits deriving from the state regulation against the nature and extent of the burden which that state regulation has upon interstate commerce. The Supreme Court's general rule for determining the validity of state laws affecting commerce is the following:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities.*"
>
> *Pike v. Bruce Church, Inc.*, 90 S.Ct. 844, 847 (1970).

Clearly, in this instance, the state has a sufficient interest in the protection of the morals of its citizens so as to prohibit the distribution of obscene materials within the state.[6] However, that interest could be just as well protected by the utilization of a national standard, rather than a statewide standard, when applying Penal Code Section

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6 In terms of the regulation of pornography, the state interests in suppression have been normally articulated as follows: 1) the protection of juveniles; 2) the protection of adults from degenerate influences; 3) the protection of the public from intrusions on their sensibilities, and incitements to anti-social conduct; the protection of individual adults from intrusions on their sensibilities, and from incitements to anti-social conduct. See *Stanley v. Georgia*, 394 U.S. at 565; Katz, *Privacy and Pornography*, 1969 Supreme Court Review, 203, 206-207. The argument as to anti-social behavior was dismissed in *Stanley v. Georgia*, 394 U.S. at 566, where the Court said: "There appears to be little empirical basis for that assertion." The argument as to degenerative influence was also discussed in *Stanley*, 394 U.S. at 565, where the Court said: "We are not certain that this argument amounts to anything more than the assertion that the state has the right to control the moral contents of a person's thoughts." Thus, by a process of elimination, this Court has tended to indicate that the only legitimate interests the state has in the suppression of pornography is the protection of juveniles and the protection of adults from intrusions upon their sensibilities. See, also, *Redrup v. New York, supra.*

311.2 in the prosecution of materials which can be or have been disseminated widely throughout the United States, i.e., films, books, magazines and other printed materials.

This utilization of a statewide standard imposes upon the distributors of such materials the oppressive burden of tailoring products to meet the vagaries of local censorship and the particular sensibilities of the individual states. In such a case, the local rule should be discarded because of its adverse effect on the free flow of commerce.[7] *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520.

Thus, even assuming *arguendo* that when viewed *solely* from the perspective of the First and Fourteenth Amendments the various states have broader power to regulate speech than the federal government, that regulatory power to the states is not so broad when the Commerce Clause comes into play. In such a case, a national standard is required because of the emanations of the Supremacy Clause which operates as an instrument of federalism. Thus, although in strictly First and Fourteenth Amendment context the argument is entertainable that there are different standards appropriate for the federal government and the various states, under the Commerce Clause and Supremacy Clause that argument loses much vitality. In fact, any analysis based upon the distribution of powers between the federal government and state governments would then indicate that the federal power must be pre-emptive, i.e., that a national standard is necessary.

Clearly, the right of persons to exhibit and distribute materials, ostensibly under the protection of the First Amend-

7 It is clear that *some* states do in fact adopt national standards while other states adopt some lesser standards. See, *supra*, note 4.

ment, from state to state, free of unconscionable obstacles, occupies a more protected position in our constitutional system than does the movement of mere cattle, fruit, steel and coal across state lines. We are dealing with a fundamental right protected by the First Amendment, and in this situation the material takes on an even more sheltered and favorable position under the Commerce Clause. Inhibition, as well as prohibition against the exercise of precious First Amendment rights, is a power denied the government. *Freedman v. Maryland*, 380 U.S. 51; *Garrison v. Louisiana*, 379 U.S. 64; *Speiser v. Randall*, 357 U.S. 513.

Many times in the past, the Commerce Clause has been utilized to enforce and vindicate private rights and personal liberties in the face of state regulations, which either directly or indirectly, on their face or through their application, sought to violate those rights and liberties, e.g., freedom of movement, freedom of association, etc. See *Edwards v. California*, 314 U.S. 160; *Robbins v. Shelby County Taxing District*, 120 U.S. 489; *Ward v. Maryland*, 79 U.S. (12 Wall.) 418; *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35.

In effect, the application of Penal Code Section 311.2 in this manner adversely affects the liberty of the circulation of materials protected under the First Amendment. As Mr. Justice Hughes said in *Lovell v. Griffin*, 303 U.S. 444, 452:

> "Liberty of circulation is as essential to that freedom [First Amendment freedom of the press] as liberty of publishing; indeed, without the circulation, publication would be of little value."

III

The State Prosecution Under California Penal Code Section 311.2 For Mailing Obscene Material Constituted Error Because Federal Law Has Completely Pre-empted The Field.

The prosecution by the state for distributing allegedly obscene materials (when, in fact, the distribution is a "mailing"), under a state statute, is repugnant to the United States Constitution, Article I, Section 8, Clause 7, under which Congress pre-empted the regulatory field by enacting the Federal Obscenity Law which specifically punishes the mailing or advertising by mail of obscene materials. This result is entirely consistent with *Roth v. United States*, 354 U.S. 476 (1957), in which the Court upheld the state's power to punish the keeping for sale of obscene material, or even advertising such materials, since these were essentially local activities and did not necessarily involve the obstructing of the mails. *Roth, supra*, at 494-500.

Congressional power over the mails is practically plenary. United States Constitution, Article I, Section 8, Clause 7; *Donaldson v. Reed Magazines*, 333 U.S. 178 (1948); *Hinds v. Davidowitz*, 312 U.S. 52 (1941); *Milwaukee Publishing Co. v. Burleson*, 254 U.S. 407 (1921); *In re Debs*, 158 U.S. 564 (1895). Moreover, it is clear that Congress has fully legislated in the field. 18 U.S.C. Sections 1461, 1462, 1465.

Under 18 U.S.C. Section 1461,

> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be non-mailable, or

> knowingly causes to be delivered by mail according to the direction thereon, or at the place to which it is to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof . . . "

is guilty of a crime.

Thus, the conclusion is inescapable that Congress has intended to occupy completely this field of obscenity in the context of mailing. A state obscenity law touching the mailing of obscene matter is superseded regardless of whether it merely purports to supplement federal law.

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition as state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."
>
> *Charleston and Western Carolina Railroad Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1917).

Moreover, in this context, the federal government has an even more acute interest because of the involvement of First Amendment rights. The federal government has an overriding interest to protect the free flow of mails and the free flow of communication from the blockage and disruption which would arise if every state were permitted to apply a variable standard to determine obscenity, i.e., a standard pegged, as here, to a statewide test of community standards rather than nationwide standards.

The First Amendment guarantee of freedom of the

press and expression, of course, comprehends every sort of publication which affords a vehicle of information and opinion. This liberty is protected at every step in the process of creation, publication and circulation, from the writing and printing of the words until the material reaches the hands of the ultimate reader.

It would be awkward, to say the least, to have materials traveling through the mails change their character from obscene to non-obscene as they pass from one state to another. In this area, it is thus clear that the government must speak with one voice. This is only possible if the federal government standard for obscenity is uniformly applied in the context of the mailing of materials of this purported character. See *Commonwealth v. Gordon*, 66 D.C. 101, 136 (Pennsylvania, 1949).

The Congress has spoken, and this must be considered the last word on the subject. Title 18, U.S.C., Sections 1461-1465, completely pre-empts the field with regard to the punishment for the mailing of obscene materials. It is of absolutely no avail to the states to say that they have the inherent power to regulate distribution of obscene materials, when it is clear that what they mean by distribution is "mailing."

IV

The Determination Of The Contemporary Community Standards For The Purpose Of Establishing Obscenity, If Based Upon An Unscientific Survey, Is Violative Of First And Fourteenth Amendments And The Sixth Amendment To The United States

Constitution.

One of the necessary requisites for showing that material is obscene is that it is patently offensive because it affronts contemporary community standards relating to the description of sexual matters. *Memoirs v. Massachusetts, supra.* In California, this constitutional requisite would have had to be embodied in the language of Penal Code Section 311, which refers to "customary limits of candor." *Giannini, supra,* 69 Cal.2d at 574. It is clear that failure to introduce proof of contemporary community standards is reversible error. *In re Giannini, supra.*

The prosecution offered the testimony of only one witness to prove that the material was substantially beyond the community standards. As will be shown, that "expert" witness was totally unqualified; hence, as a matter of law, the conviction must be overturned because there was insufficient evidence to establish a crucial element.

The prosecution put an Officer Shaidell on the stand to give his expert opinion on the question of whether the materials involved in the trial went beyond the customary limits of candor in the community. To show that he was familiar with the standards of the whole community, which was absolutely necessary to qualify him to give his opinion on this matter, the prosecution established that he had conducted a state survey on the question of what the community "felt" was beyond the customary limits of candor. (RT*, Volume III, Section 1, pages 116-117.)

Petitioner contends that admitting the introduction of Officer Shaidell's opinion testimony as an expert, based on

*(RT refers to Reporter's Transcript.)

this survey, was prejudicial and constituted reversible error.

It is clear that allowing the essential requisite that the material be shown to be "substantially beyond the customary limits of candor," as stated in Penal Code Section 311 and applied in Penal Code Section 311.2, be proved by the egregiously non-objective evidence would be violative of the First and Fourteenth Amendments. The California Supreme Court, in *In re Giannini, supra,* made clear that "we must achieve so far as possible the application of an objective, rather than subjective, determination of community standards." 69 Cal.2d at 574-575.

Although it is clear that the proof of the community standards must be objectively based, petitioner is not arguing that the court must demand some absolute unrealistic demonstration of objectivity that would make prosecution and conviction impossible. However, the petitioner is maintaining that where an expert is permitted to testify on community standards on the basis of a survey which is egregiously and patently defective, and where that testimony is the only prosecution evidence introduced to prove the requisite that the material goes substantially behind the customary limits of candor of the community, then, in effect, there was no expert testimony and the First and Fourteenth Amendments would require that the conviction be reversed.

Two basic requirements must be met before opinion polls are to be given probative weight: (1) Necessity; and (2) Trustworthiness. *Smith v. State,* 268 N.Y.S.2d 873, 49 Misc.2d 985 (1966); *Zippo Manufacturing Co. v. Rogers Imports, Inc.,* 216 F.Supp. 670 (S.D.N.Y. 1963). In *Miles Laboratory, Inc. v. Frolich,* the court admitted a survey after there was testimony by an independent expert that

the method of "testing and sampling and selecting and training interviewers was as fair and reasonable as could be devised," 195 F.Supp. 256, 262 (S.D. Cal. 1961). *Cf.* Barksdale, *The Use of Survey Research Findings as Legal Evidence*, 31-33 (1957).

If, in order for the results of an opinion survey to be probative, it is necessary to show that the methodology used to construct and conduct the survey was scientifically sound, then, *a fortiori*, the expertise of the purported expert rendering an opinion based on the results of the survey can also only be established by showing that validity of the survey. In the area of the First Amendment, the state is constitutionally compelled to adopt regulations, standards or methods which are the least intrusive and the most narrowly circumscribed available for the accomplishment of its legitimate purpose. *Butler v. Michigan*, *supra*, 325 U.S. 380.

By these standards, it is clear that the survey used in this case to qualify Officer Shaidell was defective. By no stretch of the imagination could Officer Shaidell be deemed a valid expert, capable of rendering a valid and objective opinion as to "community standards."

There are several grounds upon which the petitioner argues that the survey used was defective:

(1) Officer Shaidell surveyed an unrepresentative group of people in the state. He paid no attention to the distribution of the people among the counties he surveyed (RT, Volume III, Section II, pages 20-21); he did not pay attention to the economic status of those surveyed (RT, Volume III, Section II, page 13); he chose groups to interview which were particularly middle of the road and

establishmentarian, e.g., church groups, PTA, Naval Reserve units, fraternal organizations (RT, Volume III, Section II, page 11);

(2) The questions asked were not scientifically selected to test for the information desired to be ascertained (RT, Volume III, Section II, pages 12-15);

(3) In his questioning of subjects, he did not ask them whether the material went "substantially" beyond the customary limits of candor (the exclusion of that word alone, which is contained in Penal Code Section 311, could have significantly invalidated the relevance of that survey);

(4) The very fact that the survey was conducted by a police officer who identified himself as such to the subjects interviewed was arguably sufficient to distort and bias the responses.

Thus, on these facts, it is apparent that Officer Shaidell's credentials, based upon that survey, are woefully defective. Permitting a conviction based upon that testimony would be constitutionally unconscionable.

It is clear that to allow any unqualified expert to come into the court and establish that allegedly obscene material is beyond the "community standards" would not only have a chilling effect on First Amendment rights but would also raise serious Sixth Amendment problems. Normally, the groups surveyed are not available for cross-examination by the defendant; hence, without the safeguard of a valid survey, the defendant, confronted by an expert who is in effect giving expressions of standards and judgment of the community, is truly forced to contend with nameless and faceless adversaries. This is a serious violation of the defendant's right of confrontation, secured by the Sixth Amend-

ment. *Pointer v. Texas*, 380 U.S. 400 (1965).

V

The Conviction Of Petitioner For Violation Of Penal Code Section 311.2 Was Erroneous Because, As A Matter Of Constitutional Fact, The Materials Were Not Obscene.

The appellate court must, in the course of reviewing the entire record, review the material adjudged obscene by the lower court. *Jacobellis v. Ohio, supra*, 378 U.S. at 188-189; *Zeitlin v. Arneberg*, 59 Cal.2d 901, 909 (1963).

Petitioner argues that, as a matter of law, the constitutionally requisite elements of obscenity were not shown to exist in this case. Thus, petitioner's conviction below violated the First and Fourteenth Amendments.

Three elements must coalesce before material can be held obscene: (1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material must be utterly without redeeming social value. *Memoirs v. Massachusetts, supra.*

It is clear that material cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though it is found to possess the requisite prurient appeal and is also found to be patently offensive. Each of the three federal constitutional tests is to be applied independently; social value can neither be weighed against nor cancelled by its prurient appeal or patent

offensiveness. The material must be tolerated even if it is possessed of only a modicum of social value. *Memoirs, supra; Jacobellis, supra; Roth v. United States, supra.*

In this case, it is patently clear that the requisite elements were not established. The prosecution witness testifying as to prurient interest admitted that the material had some beneficial use for normal people (RT, Volume IV, Section II, page 18). Moreover, the prosecution witness testifying as to redeeming social value admitted that the material had some usefulness (RT, Volume III, Section I, pages 86-87).

The prosecution is bound by these statements of its own witness. The prosecution, as a part of its case, presents exculpatory evidence; it is bound by that evidence, and the defense is not required to introduce the same evidence in order to be benefited by it. *People v. Collins,* 189 Cal.App.2d 575, 589, 591 (1961).

It is important to reiterate that it must be found that the material is utterly without socially redeeming value. That was not shown in this case. Moreover, all three elements must be shown. So that if any one fails, the matter must be treated as constitutionally protected.

It was further shown that the prosecution did not meet its burden to show that the material went beyond the standards of the community, both because in this instance the relevant community was the nation, and not the state, *In re Giannini, supra; Jacobellis, supra,* and because even if the state were the right community, Officer Shaidell was not qualified to speak on community standards based on his defective survey.

VI

The Conviction Of The Petitioner Under The Amended Language Of Penal Code Section 311, When The Amendment Was Subsequent To The Offense, Was Constitutionally Defective In That It Was The Application Of An *Ex Post Facto* Law.

The act for which petitioner was indicted took place prior to the amendment of Penal Code Section 311(e). Under the language of the Penal Code in effect at the time of the alleged offense, the relevant language was:

> "Having knowledge that the matter is obscene."

Petitioner was indicted and convicted under Penal Code Section 311(e) when it read:

> "Knowingly means being aware of the character of the matter . . . "

The section was amended on June 25, 1969, Amended Stats. 1969, Chapter 249, Section 1, Page 598.

Under Government Code Section 9605:

> "When a section or part of a statute is amended . . . . (n) provisions are to be considered as having been enacted at the time of the amendment."

There is a presumption that any essential change in the phraseology of a statute indicates an intention on the part of the legislature to change its meaning rather than to interpret it. *Todd Estate,* 17 Cal.2d 270 (1941); *Dalton v. Baldwin,* 64 Cal.App.2d 259 (1944); *Coker v. Superior Court,* 70 Cal.App.2d 199 (1945).

Here, the change in the language of the statute was material, in that it made the standard for proving "knowledge"

less stringent. It is clear that the retroactive application of the less stringent standard to the petitioner's trial could only have operated to penalize him.

When the elements of an offense are legislatively changed, as here, and where the alleged offense took place prior to the amendment, the defendant cannot be held to the new standard. This is constitutionally barred by the prohibition against *ex post facto* laws. This is true whether the law is enacted by the federal government, Article I, Section 9(3), or by the state government, Article I, Section 10(1); *Calder v. Bull, supra,* 3 U.S. 386 (1798); *In re Estrada,* 63 Cal.2d 749 (1965). See, also, *Wilke and Holzheiser, Inc. v. Department of ABC,* 65 Cal.2d 349 (1966); California Government Code Section 9608.

A defendant may be given the benefit by a retroactive application of a change in the law, but it is fundamental that he may not be penalized. *In re Estrada, supra; In re Kirk,* 63 Cal.2d 761 (1965).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

BURTON MARKS of
MARKS, SHERMAN, LONDON, SCHWARTZ & LEVENBERG
A Professional Corporation
Attorneys for Petitioner.

INDEX TO APPENDIX

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., October 12, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP 872 PEOPLE VS MILLER, Marvin

This matter having heretofore been under submission, the Court now rules; the judgment is hereby affirmed and the cause remanded to Municipal Court. ENTERED 10-12-70.

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MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., November 2, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP-872 PEOPLE VS MILLER, Marvin

Petition for rehearing and in the alternative, Petition for certification to the Court of Appeal, Fourth Appellate District having been received and considered, the Court now

rules: the Petitions and each of them are hereby denied. ENTERED 11-2-70.

• • • •

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT AND APPLICATION FOR STAY PENDING APPEAL

In the Appellate Department of the Superior Court, County of Orange, State of California.

No. AP-872 (Lower Court: OCMC, Harbor No. M50760)

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. MARVIN MILLER, Appellant.

Notice of appeal and application for stay pending appeal to the United States Supreme Court is hereby given by Marvin Miller, Petitioner and Appellant herein, from the Order of this Court dated October 12, 1970, by which it affirmed the judgment of the court below. On November 2, 1970, this Court denied Petitioner/Appellant's Petition for Rehearing and in the Alternative, Petition for Certification to the Court of Appeal, Fourth Appellate District.

This Appeal is taken *inter alia* on the following grounds, without intent to enumerate all of his defenses, that Petitioner/Appellant by his appeal and his Petition for Rehearing/Certification:

1. Challenged the constitutionality of the application of a "statewide" standard in judging obscenity under Penal Code § 311.2 under the First and

Fourteenth Amendments;

2. Challenged the constitutionality of the application of an unscientific survey to qualify an expert witness to testify as to the "community standards" requirement in the legal definition of obscenity pursuant to Penal Code § 311.2 in contravention of the First and Fourteenth Amendments;

3. Challenged the prosecution under Penal Code § 311.2 for mailing obscene material as a contravention of the doctrine of Federal Pre-emption and the Supremacy Clause of the United States Constitution.

4. Challenged his conviction under the amended language of Penal Code § 311. as an application of an *ex post facto* law;

5. Challenged his prosecution and conviction for mailing obscene material in that under the Fifth Amendment's prohibition against double jeopardy the state was collaterally estopped from claiming that the material was obscene.

This appeal is being prosecuted pursuant to the authority of Title 28 U.S.C. § 1257(2), and

That the Order of this Court, dated October 12, 1970, and reading as follows: "Affirmed," and the denial of Appellant's Petition for Rehearing/Certification constituted a finding that Penal Code § 311.2 of the State of California was constitutional on its face and as applied, and Appellant hereby gives his Notice of Appeal from that finding.

DATED: November 6, 1970.

MARKS, SHERMAN & LONDON
BY: BURTON MARKS
Attorneys for Appellant

[PROOF OF SERVICE BY MAIL annexed, showing service on the Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

CECIL HICKS, District Attorney
P. O. Box 808
Santa Ana, Calif.

MUNICIPAL COURT OF THE ORANGE COUNTY JUDICIAL DISTRICT - HARBOR
567 West 18th Street
Costa Mesa, California 92626.

Executed on November 6, 1970, at Beverly Hills, California.]

• • • •

CALIFORNIA PENAL CODE

§ 311. Definitions

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly

without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing,

speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state.

(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has

in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to:

A motion picture machine operator acting within the scope of his employment as an employee of any person exhibiting motion pictures pursuant to a license or permit issued by a city or county provided that such operator has no financial interest in his place of employment, other than wages.

• • • •

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on MAY 12, 1971, I served the within BRIEF FOR PETITIONER (NO. 1288) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 12, 1971, at HUNTINGTON BEACH, CALIFORNIA.

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IN THE

Supreme Court of the United States

October Term, 1970

~~No. 1288~~ 70-73

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal From the Appellate Department of the Superior Court of the County of Orange, State of California.

BRIEF FOR RESPONDENT.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

Appellant, after a trial by jury, was convicted of distributing obscene matter in violation of California Penal Code Section 311.2. The material consisting of five advertising leaflets is before the court and speaks for itself.

At the trial, the evidence showed that the five leaflets had been received in Orange County by an Orange County resident. Doctor Sears, Professor of English, testified that in his opinion the leaflets were utterly without redeeming social importance [R.T. III, pp. 4-114, IV, pp. 12-50]. Doctor Wagner, a psychiatrist, testified that in his opinion the materials were utterly without redeeming social importance and appealed to the prurient interest of the average person in the com-

munity [R. T. IV, pp. 77-142, Sec. II, pp. 24-29]. Sergeant Shaidell of the Los Angeles Police Department, testified that the items went substantially beyond the limits of candor of the community [R.T. III, Sec. I, pp. 114-142; Sec. II, pp. 4-93]. Appellant's expert Doctor Caroline Stuark, presently a part-time teacher of extension classes, testified that the materials had some redeeming social importance because the materials by advertising a certain type of books "tell us a great deal about the society from which the books sprung, the culture, the way we live, the place we live, some of our concerns" [R.T. IV, Sec. II, p. 32].

This appeal followed the conviction in the above case.

SUMMARY OF THE ARGUMENT.

1. While several Justices of the United States Supreme Court have expressed the opinion that evidence relating to standards of the community, prurient appeal and redeeming social importance should be introduced in a state obscenity trial, in no instance has it ever been suggested that the introduction of national experts at a state trial be made a constitutional requirement. In *Smith v. California,* 361 U.S. 147, some of the Justices in fact remarked that a defendant should be allowed to introduce expert testimony *by way of defense.* In *Jacobellis v. Ohio,* 378 U.S. 184, This Honorable Court concluded that on appeal the Court should make an *independent* constitutional determination of obscenity of the materials before it. *Ginzburg v. United States,* 383 U.S. 463, points out that ordinarily This Honorable Court has regarded the materials as sufficient in themselves for the determination of the question.

2. There is no merit to Appellant's contention that the introduction of Statewide standards at an obscenity trial violates Article I, Section 8, Cl. 7 of the United States Constitution since the Federal Government does not have the right to control the morals of citizens under the commerce clause. Such power, if anything, has historically resided in the States and not in the Federal Government. (*Roth v. United States*, 354 U.S. 476).

3. *In re Giannini*, 69 Cal. 2d 563 properly held that a statewide standard is proper in matters of local concern and in the case before the Court there is no evidence that the material, consisting of advertising leaflets was intended for anything other than local distribution. Moreover, Appellant at the trial level never even suggested that the material was intended for other than local distribution, nor did he ever contend that a national standard would differ from a state standard.

4. Expert testimony presented by Respondent at the trial tended to relate to a national rather than a state social community while Appellant's expert witnesses spoke in terms of a state wide community. Since Respondent's experts applying national standards found the materials to be substantially beyond the limits of candor of the community, utterly without redeeming social importance and appealing to the prurient interest, while Appellant's experts, applying statewide standards, found that the materials did not go beyond the limits of candor of the community and had some redeeming social importance, the application of statewide standards rather than national standards, benefited rather than injured Appellant.

5. Since what was prosecuted in this case was the dissemination of obscenity to a California resident and not the *mailing* of obscene matter no pre-emption issue is present.

6. Since Appellant entered a plea of "not guilty" and has not properly raised the issue of double jeopardy in the trial court, he may not raise the issue of double jeopardy on appeal.

7. Since the Court instructed the jury according to the law as it existed at the time of offense there was no retroactive application of law as contended by Appellant.

8. The materials consist of a collection of depictions of cunnilingus, sodomy, orgies and other sexual acts. The depictions are utterly void of social importance and represent hard core pornography under any conceivable test.

I.

The Presentation of National Expert Testimony Is Not a Constitutional Requirement.

In setting forth the proper test of obscenity, in *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, 1509, this Honorable Court approved the following jury instruction:

> ". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called wordly-wise and sophisticated indifferent and unmoved. . . .
>
> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those

whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

The then Chief Justice Warren, in his concurring opinion, went on to point out:

> The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached.

Mr. Justice Harlan's concurrence to the rationale used in disposing of the *Alberts* case, stated:

> Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader.

In his dissent to the rationale used in disposing of the *Roth* case the same Justice found protection from censorship in the existence of varying state standards since what will be found obscene in one state will not necessarily be found to be so in another:

> Different States will have different attitudes toward the same work of liteature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.
>
> Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard.

The first and only comment on evidentiary proof of community standard is found in Mr. Justice Harlan's concurring opinion in *Smith v. California,* 361 U.S. 147, where in discussing the trial court's exclusion of appropriately offered testimony through duly qualified witnesses regarding "the literary and moral criteria by which books relevantly comparable . . . are

deemed not obscene," he advocates the admission of expert testimony and states:

> The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—"using that term in its primary sense of an opportunity to be heard and to defend [a] . . . substantive right," *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 US 673, 678, 74 L ed 1107, 1112, 50 S Ct 451—requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

However, Mr. Justice Harlan there concludes by cautioning against imposing on the states the necessity of *proving* their case by the introduction of any particular kind of evidence:

> However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a

> State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof.

In *Jacobellis v. Ohio*, 378 U.S. 184, the Court, for the first time inquired into the true meaning of "community standard." The Justices Brennan and White declared themselves in favor of a *national* standard. The Justices Clark and Warren argued in favor of a local standard and stated:

> It is my belief that when the Court said in Roth that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities through the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

Respondent, however, respectfully submits that the two views expressed in *Jacobellis, supra,* do not deal with the necessity of expert testimony at a state trial.

Jacobellis in fact deals primarily with the Supreme Court's power of review over obscenity and with the standard to be used in exercizing this power of review. The primary concern of *that* standard of review is the protection of the dissemination of ideas. The standard in *Jacobellis* thus has or should have primary reference to the third yet most important element which must coalesce before a work can be declared obscene—namely the existence of social redeeming importance. And in dealing with that element it seems eminently proper to apply a national standard. In dealing with elements of proof of prurient appeal and of limits of candor on the other hand, the concern is with individual physical reactions rather than with abstract ideas, and a standard local in nature is far more apt to adequately reflect the physical reactions of other beings within the same basic culture. More important, *Jacobellis* does *not* in any way set forth the requirement for the type of testimony to be presented to the jury for it fully realizes that no matter *what* kind of expert testimony is presented to the jury, the jury will make its decision within the more limited scope of the jury's own experience. And it is for this reason and this reason alone that *Jacobellis* imposes on the Appellate Courts the duty to protect free expression by making an *independent* constitutional determination of obscenity of the materials before it. And it is in setting forth the standard to be used by the Appellate Courts that *Jacobellis* speaks of a non-local standard. The Court states:

> Hence we reaffirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of

the case as to whether the material involved is constitutionally protected.

The question of the proper standard for making *this determination* has been the subject of much discussion and controversy since our decision in Roth seven years ago.

The court goes on to say:

It has been suggested that the "contemporary community standards" aspect of the Roth test implies a determination of the *constitutional question* of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth. (Emphasis added).

And the court concludes:

We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.

That this is the intent of the opinion is further made clear by the statement at note 3:

"It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, *neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression.* Their decisions must be subject to effective, independent review, and

> we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court."

It is further supported by the fact that in obscenity cases this Honorable Court in most instances looks only to the material in question (*Cf. Ginzburg v. United States,* 16 L. Ed. 2d 31, 383 U.S. 463).

What appellant is now attempting to do is apply the dictates of *Jacobellis* and to make them a Constitutional requirement of the type of evidence to be presented to the jury. Respondent submits that this impossible requirement is a far cry from the *Smith* opinion where even the most liberal members of the Court advocated *allowance* of such evidence by way of defense.

Additionally, in light of *Jacobellis,* how has appellant or any defendant been injured by the presentation of state experts at an obscenity trial? And of what meaning would be the testimony of nationwide experts? Had national experts been presented and had the appellant been found guilty would the Court of Appeals be *bound* by the opinion of the experts? In light of *Jacobellis* the answer is clearly in the negative. In obscenity cases where the "weight and sufficiency" of the evidence have nothing to do with the finding of the "Constitutional fact" of obscenity, a constitutional requirement that any expert evidence be presented at the trial would seem meaningless. As pointed out in *Ginzburg v. United States,* 16 L. Ed. 2d 31, 383 U.S. 463:

> In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question.

Accordingly Respondent submits that this Honorable Court's requirement of a *national* standard in making a Constitutional determination of obscenity does not carry with it the Constitutional requirement of presenting the jury with national or state experts.

II.

The Use of a State Wide Standard Was Not in Violation of Article I Section 8 of the United States Constitution.

Appellant seeks to support his contention that a national standard is required by arguing that use of a state wide standard collides with the commerce clause. The fallacy in this argument lies in the assumption that the powers of the United States Supreme Court to oversee obscenity stems from the commerce clause. Constitutionally, however, the Court's duty to oversee obscenity exists *only* to safeguard the guarantees of the First Amendment. For a conflict to arise because of the commerce clause, there would have to exist in the Federal Government the right to control the morals of citizens under the commerce clause. The non-existence of such right is amply set forth in *Roth v. United States, supra,* where the court states:

> We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art 1, § 8, cl 7.

The interrelation of Federal versus State power is also quite clearly there set forth in Mr. Justice Harlan's dissenting opinion:

> But in dealing with obscenity we are faced with the converse situation, for the interests which ob-

scenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.

And in *Jacobellis* the Court reiterates its concern with *dissemination* of ideas, not with *commercial dissemination:*

It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one "community" holding it to be outside the constitutional protection. The result would thus be "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."

There is accordingly no merit to appellant's contended violation of the commerce clause.

III.

The Evidentiary Requirements Set Forth by the California Supreme Court in In Re Giannini, 69 Cal. 2d 563, Do Not Infringe Appellant's Constitutional Rights.

In *In re Giannini,* 69 Cal. 2d 563, the California Court, for the protection of the defendants found it necessary to impose on the People the heavy burden of producing evidence on community standards. Such requirements, however, are not Constitutionally necessary and merely seek to give guidance to the jury. They

are thus clearly not binding on the Court upon which rests the duty of determining obscenity in the Constitutional sense under the guidance of this Honorable Court.

Moreover, in the *Giannini* case, the Court is only speaking of subjects intended for local consumption and dissemination and specifically refuses to determine the applicability of national standards to books or films by stating:

> But we need not, in the instant case, reconcile this contention with the practical problems of producing evidence of national standards. Iser's dancing is purely local in nature, a subject matter obviously not intended for nationwide dissemination. Since the decision as to whether to stage a "topless" dance rests solely on local considerations, the problem that unduly restrictive local standards may interfere with dissemination of and "access to [such] material" as books or film does not arise in the instant case.

Respondent submits that a local standard on local subjects is always proper (See *In re Giannini, supra*).

In the case at hand the items involved are *not* books nor films nor other items obviously meant for national distribution, but consist of advertising leaflets. Appellant at the trial presented no evidence whatsoever as to distribution or intent to distribute other than on a purely local or at best statewide basis. Under the circumstances Respondent submits that it would require imagination to surmise that the advertising leaflets were intended for other than local distribution.

Moreover, California is the most populous state in the United States. Statistics of which this Court can

take judicial notice show California to be one of the most sophisticated states in the country. Contemporary community standards of the State of California would thus be far more liberal than those of the national community. Additionally since the population of the State of California compares favorably in the national socio-economical scale and represents approximately 10% of the national community, the standards of the California community would adequately reflect the national standards.

Finally, Appellant himself throughout the trial *never* once contended that the national standard was different from the California standard nor did he present evidence that the national standard was different. Rather he limited himself to presenting evidence of the California Standard. He cannot now, at this stage of the proceedings, complain because evidence of national standards was not presented.

IV.

The Expert Testimony Presented by Respondent Adequately Informed the Jury on the Issue of Obscenity.

A comparison between the expertise and testimony of Appellant's experts with those of Respondent's shows that the text used by Appellant's witnesses to determine the standards was incorrect. It further shows that Appellant was, if anything, benefited by the use of state rather than national standards.

Doctor Cee, Appellant's principal expert, has a B.A. from Los Angeles State College, and an M.A. and Ph.D. in English Literature from U.C.L.A. Her experience consists of two years teaching at U.C.L.A. and part time teaching of extension courses [R.T. IV,

p. 54]. She has published a novel and a scholarly article and writes regularly for T.V. Magazine, West Magazine and Status Magazine [R.T. IV, pp. 56-57]. In addition Doctor Cee has apparently asked several personal friends [R.T. IV, p. 66] whether materials similar to the leaflets involved herein are available in any of the stores and libraries in her friend's area [R.T. IV, pp. 59-60]. In determining contemporary *state* community standards she relies on the street interviews (numbers unknown) with members of the public [R.T. IV, p. 65], although most of her interviews, however, seem to have consisted of general casual conversations with friends [R.T. IV, pp. 72, 74]. She determined community standards "by what they (the public) buy that's offered," and concluded that the materials were not utterly without redeeming social importance because:

> A. There are specific reasons for each brochure; and I think also the general reason would be that each of the brochures, as they advertise the particular book for sale, tells us—can't help but tell us a great deal about the society from which the books sprung, the culture, the way we live, the place we live, some of our concerns; and that's the general, the main general reason [R.T. IV, Sec. II, p. 32].

She found that the leaflets did not go substantially beyond community standards because:

> A. There are books speaking of the graphic material. First of all there are books for sale in legitimate conservative bookstores, which contain not only a good deal of pictures with the same subject matter treated in the same way; but in

some cases some of the identical pictures, which are, if not in the brochures, in the books which they advertise [R.T. IV, Sec. II, p. 33].

By contrast Doctor Sears, one of Respondent's experts on redeeming value, whose experience, scholarly qualifications and publications are too lengthy to set forth here [R.T. III, pp. 5-66, Peoples F13], asked why he felt qualified to determine the redeeming social importance of the leaflets in question, replied:

> A. I would base my opinion on the necessity to be in touch with all parts of the United States over the last ten years, through editing journals, through reading the literature that is being produced, from being a consultant of a number of publishing houses, including the illustrations as well as the textroom matter [R.T. III, p. 72].

After stating his opinion that the materials were *utterly* without social redeeming importance [R.T. III, pp. 86, 87, IV, p. 35], he went on to show by what means he had come to have this opinion and explained:

> A. . . . I think I just answered the question in the best way I have; answering, that the subject matter, per se, is not at issue; the fact that men and women have intercourse in a variety of ways. These are human; and human acts make them a subject for human discussions, presentations, artistic treatments—the question is how is it presented? What is the particular theme when I look at the totality? I can only judge the totality [R.T. IV, p. 41].

Time and again he pointed out that it is only within the context of a text or of a totality that materials can

be judged in the sense that the same language, scene, depiction, photograph, painting or graphic presentation of sexual material can be utterly without redeeming social importance in one context and yet have redeeming social importance in another. Speaking of *Portnoy's Complaint* as an example, he stated:

> . . . The subject of masturbation would be considered a taboo subject. It has been in many cultures and in our own culture for many times, per se. I do not find that subject matter improper for artistic use. I do, however ask that it be artistic use that has a reason for being. That it has some, you may use those abused terms, "social value." *Portnoy's Complaint* has this, and I find the book not objectionable. Picasso's collection of erotic paintings may have this. It has been so testified to by some fine artistic critics. This packet of material to which I am testifying—I find to have no social value [R.T. IV, pp. 40-41].

And asked whether acceptance by some segment of the society is of itself sufficient to show redeeming social importance he replied:

> No. The facts of their acceptance would be all the value they have. In and of themselves they might have no value at all.
>
> Q. In other words, if they are accepted, that alone may mean they have social redeeming value?
> A. No. I said the fact that such are sold in an X quantity in a given society may be the total significance and value. The thing itself may be without value [R.T. IV, p. 45].

From the above testimony and the tests set forth by the Court in *Smith* and *Jacobellis*, it can be clearly seen

that the standard applied by Doctor Sears is reached by application of the test advocated by this Court whereas the standard applied by Appellant's expert in attributing redeeming social importance to the items here in question is totally inadequate. The result reached by Appellant's experts is thus meaningless.

Additionally, Doctor Wagner's testimony, as well as that of Doctor Sears related to American *society* as a whole while Appellant's witnesses related their testimony to the State of California.

Doctor Wagner's background [R.T. IV, pp. 78-82, 85-95] speaks for itself. Significantly he has been licensed to practice as a psychiatrist in California, Washington State, Texas, Missouri and Illinois and has come in contact with patients in all of those states. After studying the leaflets he stated that in his opinion they definitely appealed to a prurient or morbid interest in sex, nudity and or excretions, and concluded:

> Well, as a whole I notice there seems to be an emphasis on things that we ordinarily consider as deviant sexual stimulants, and things which we feel, I mean, as people are somewhat immoral; and by these things I mean, such things as orgies, bestiality, homosexuality, and in some cases exaggeration of phallic and genital areas; and in some of them evidence of sadism, and in general all the things which I personally associate with the harmful type of aphrodisiac or harmful type of pornography [R.T. IV, p. 111].

The reasons why, as a doctor and a psychiatrist he finds the materials to be not only utterly without redeeming social importance but in fact harmful are set forth in terms of the mental and psychological reac-

tions of human beings conditioned by a particular society—American society [R.T. IV, p. 115]. Doctor Wagner analyzes the harmfulness of the leaflets in terms of conflicts between the sexual desires which arise in the average person in viewing the material, and the guilty feeling created by the environmental training of the average person in today's society [R.T. IV, pp. 115-118]. Because he based his conclusion not on his observations and study of California men but of men in American society, his testimony is sufficient whether the standard to be applied be local or national.

While Doctor Sears and Doctor Wagner testified in terms of society as a whole and concluded that the materials were utterly without redeeming social importance and appealed to the prurient interest, Appellant's own witnesses who limited their testimony to the State of California, on the other hand, found the materials to have some redeeming social importance and to have no appeal to the prurient interest of the average California person. Respondent submits that the evidence thus supports its contention that Appellant, if anything, was benefited rather than injured, by the application of local standard in this case and any error in instructing the jury in relation to state wide standards was thus harmless beyond a reasonable doubt.

Appellant's contention that Doctor Wagner testified that the material had some redeeming social importance is based on the following statements by Doctor Wagner:

> Q. Doctor, would you say that this material has no social value—don't you mean by that that

it has no beneficial value? Isn't that another word for social value?

A. Yeah, I think that could be another term for it.

Q. And would you agree that a beneficial value could be hedonistic pleasures?

A. Well—maybe beneficial immediately, but beneficial in the long run, I don't believe so. I don't believe anybody can have better sex as a result of looking at pictures. They have got to have better sex by having sex.

Q. And this might increase their sexual conduct towards each other, mightn't it?

A. Yes, but not in a—in a good sort of way. The love is part of sex pleasure.

Q. Didn't you just say that people increase their sex life by having sex? Now, my question is that this may help some people have more frequent sex?

A. I meant by having normal sex. I didn't mean by concentrating on one of the partial impulses, which is actually classified as a sexual abnormality [R.T. IV, II, p. 18].

Respondent submits that Appellant's contention is unfounded as to the content of the above statements in light of the doctor's previous and repeated denial of redeeming social importance of the material [See *e.g.* R.T. IV, Sec. II, pp. 20, 26, 28]. A reading of even a portion of Doctor Sears' testimony serves to wholly negate Appellant's contention that Doctor Sears attributed redeeming social importance to the material.

V.

The Testimony of Sergeant Shaidell Was Properly Admitted.

Appellant attacks the testimony of Officer Shaidell by assuming an invalid premise, *i.e.* that Officer Shaidell's qualifications stem only from a survey. Officer Shaidell testified as follows:

1. In the last six years he had reviewed approximately 100,000 communications from members of the public dealing with materials involving sex and nudity. The bulk of those communications involved materials sent through the mail [R.T. Vol. III, Sec. I, p. 115, lines 3-24, p. 116, lines 3-9].

2. He is in constant contact with law enforcement personnel who tell him the complaints they have received [R.T. Vol. III, Section I, p. 124, lines 9-26; p. 125, line 1; p. 126, lines 5-8].

3. He is a participant in the League of Cities [R.T. Vol. III, Section I, p. 127, lines 3-16].

4. He has traveled throughout the state and observed what was being offered to the public [R.T. Vol. III, Section I, p. 129, lines 15-23].

5. He is familiar with the Gallup Poll's survey concerning the same subject matter [R.T. Vol. III, Section I, p. 128, lines 4-11 and 18-26; p. 129, lines 1-3].

It should be further noted that he has qualified as an expert on 26 prior occasions [R.T. Vol. III, Section I, p. 130, lines 4-26; p. 131, lines 1-3].

In addition to the above, Officer Shaidell and others conducted a survey throughout the state. The questionnaire used was prepared by Shaidell and members

of the Department of Justice; reviewed by 15 deputy District Attorneys; submitted to a committee of the Attorney General; and also reviewed by two marketing professors at U.C.L.A. [R.T. Vol. III, Section 2, p. 15, lines 6-18; p. 8, lines 1-4]. It was taken to 18 of the State's 58 counties. Those counties represent 90% of the State's population [R.T. Vol. III, Section 2, p. 20, lines 15, 16]. There were 1,902 people surveyed; 105 different occupations.

In light of the above qualifications, can there be any doubt that Officer Shaidell had some special knowledge that could aid the jury?

VI.

Federal Law Has Not Pre-empted the Field and the States Have the Right to Prosecute the Dissemination of Obscene Matters Within Their Borders.

In *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498 this Honorable Court stated:

> ". . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Railway Mail Asso. v. Corsi,* 326 U.S. 88, 96, 89 L. Ed. 2072, 2078, 65 S. Ct. 1483.

Clearly the power of the Federal Government to legislate in this area is thus limited by the power granted to it by the Constitution. As pointed out in *Roth, supra:*

> ". . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and

the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

And the "power" in cases involving obscene matter is set forth in *Roth, supra,* at note 32:

> In *Public Clearing House v. Coyne,* 194 U.S. 497, 506-508, 48 L. Ed. 1092, 1097, 1098, 24 S. Ct. 789, this Court said:
>
> "The constitutional principles underlying the administration of the Post Office Department was discussed in the opinion of the court in *Ex parte Jackson,* 96 U.S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded. . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy. . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. . . ."

The prosecution under the California statute for distributing obscene matter in this case obviously in no way "imposes a burden or interferes with the Federal postal functions."

VII.

There Was No Violation of Appellant's Right to Be Free From Double Jeopardy.

Appellant's plea was "not guilty." If his contention was former jeopardy, his plea was not in accordance with California Penal Code Section 1017. However, when the plea of former jeopardy is not made before the trial court, it cannot be raised for the first time on appeal. *People v. Martinson,* 179 Cal. App. 2d 164; *People v. Fairchild,* 254 Cal. App. 2d 831.

Finally, the case which appellant cites apparently did not go to trial, and did not involve the brochures mailed to the Orange County victim.

VIII.

The Amended California Statute Was Never Invoked Against Appellant.

In the instant case, the trial court instructed the jury according to the law as it existed at the time of the offense. The court did not use Penal Code Section 311(e) as it presently exists; rather, it instructed the jury as follows:

> "Knowingly means having knowledge that the matter is obscene." The word "knowingly" as used in these instructions, imports a knowledge of the contents of the material, and being aware of its obscene character or nature. (*People v. Campise,* 242 A.C.A. 713.)

There was a lengthy, in chambers discussion, prior to instructions being given that shows the reasons

for the instruction [R.T. Vol. VI, pp. 78-81, lines 1-18].

In addition, it should be noted that the trial court gave an instruction that benefited the appellant more than the alleged instruction could have prejudiced him. It read as follows:

> In order to find the defendant guilty you must find beyond a reasonable doubt and to a moral certainty that said defendant knew not only the contents of the brochures, but that he also knew they appealed to a prurient interest in sex, that they went substantially beyond contemporary standards of candor in sexual matters and that they were utterly without redeeming social value. (Defendant's proposed jury instruction No. K—given as modified.)

IX.

The Materials Involved Are Obscene as a Matter of Law.

The materials involved are a collection of depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more. As pointed out in *Ginzburg v. United States,* 383 U.S. 463, 16 L. Ed. 2d 31, 55, by Mr. Justice Stewart, there does exist a class of materials easily identified as hard core pornography:

> ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format

grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . ."

Respondent submits that the materials here in question are merely advertizing leaflets which come within Justice Stewart's definition of hard core pornography and are obscene as a matter of law.

Conclusion.

For all the above reasons, respondent urges this Honorable Court to affirm the judgment of the trial court.

Dated this 11th day of June, 1971.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1288~~ 70-73

MARVIN MILLER,

Appellant,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AND THE AMERICAN CIVIL LIBERTIES UNION; AND BRIEF *AMICI CURIAE*

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Motion of the American Civil Liberties Union of Southern California and the American Civil Liberties Union to File Brief *Amici Curiae*

The American Civil Liberties Union and the American Civil Liberties Union of Southern California respectfully move for leave to file a brief *amici curiae* in this case. Appellant's attorney has consented to the filing of this brief; the attorney for the appellee has not responded to our request for consent.

The American Civil Liberties Union is a nationwide nonpartisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. The American Civil Liberties Union of Southern California is an affiliate of the American Civil Liberties Union and functions within Southern California where this case arose.

During its fifty-year existence, the ACLU has particularly been concerned with safeguarding the First Amendment rights of free speech, free assembly and freedom of the press. Indeed, the ACLU was born in the years immediately following the First World War when those rights were so seriously jeopardized.

While our original concern was with efforts to restrict political expression, we have long maintained that all forms of speech and writing, including "obscenity," are entitled to blanket constitutional protection.

We believe that the issue to which our brief is addressed is extremely important not only in terms of this Court's obscenity doctrine, but in terms of all aspects of the First Amendment. For if there can be a variable standard from state to state to judge obscenity, there can be differing rules governing other First Amendment matters as well.

We believe that the entire thrust of this Court's teachings cuts against such variable standards. We believe that this *amici* brief will be of assistance to the Court by pointing out the doctrinal bases for the proposition that the First Amendment erects a uniform and national barrier against local censorship.

For these reasons, we respectfully request leave to file the within brief *amici curiae.*

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

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BRIEF *AMICI CURIAE*

Interest of *Amici*

The interest of *Amici* is set out in the preceding motion for leave to file this brief.

Question Presented

This brief is addressed solely to the issue of whether the use of a "state-wide" standard to establish the "customary limits of candor" element of the present obscenity test is violative of the First Amendment.

ARGUMENT

I.

The constitutional status of allegedly obscene expression requires determination on the basis of a national standard. Application of the criteria of State or local communities would undermine independent judicial review based upon First Amendment standards essential to a self-governing people.

1. All obscenity cases are at one and the same time First Amendment cases. The suppression of any particular expression "raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible within constitutional standards". *Roth* v. *United States,* 354 U.S. 478, 497 (1957) (opinion of Justice Harlan). Since the fundamental freedoms of speech and press are indispensable to the continuing growth of a free society, "ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States . . . It is therefore vital that the standards of judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest". *Roth* v. *United States, supra* at 488 (opinion of Justice Brennan).

It misses the mark to state that obscenity is not "speech" and therefore subject to state regulation. "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." *Smith* v. *California,* 361 U.S. 147, 155 (1959). The power to

suppress obscenity is limited by the constitutional protection for free expression. "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrants of Property,* 367 U.S. 717, 731 (1961). This is but "a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks". *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963). "The line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . " *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). As Justice Brennan has noted,

> " . . . It has been suggested that this is a task in which our Court need not involve itself . . . But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates an issue of constitutional law . . . Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' " *Jacobellis* v. *Ohio,* 378 U.S. 184, 187-188 (1964).

2. The foregoing demonstrates that First Amendment scrutiny is involved in every obscenity case. Each decision

in an obscenity proceeding means either that the particular communication will enter into the "thinking process of the community", or it will be suppressed. Since "obscenity" is a limitation on the right of the public to access to constitutionally protected material, it is the character of the right, and not the limitation, which determines application of a constitutional standard. In short, the focus is on First Amendment freedoms, their values and functions in a democratic society. We are dealing with freedom of expression, "the matrix, the indispensable condition, of nearly every other freedom". *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937).

The Court has frequently emphasized the individual and social importance of freedom of expression. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States, supra,* at 484. "It is the function of speech to free men from the bondage of irrational fears." *Whitney* v. *California*, 274 U.S. 357, 376 (1927). "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940). "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlighten-

ment was ever to triumph over slothful ignorance." *Martin* v. *Struthers,* 319 U.S. 141, 143 (1943). "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press Co.* v. *United States,* 326 U.S. 1, 20 (1945). "Free discussion of the problems of society is a cardinal principle of Americanism—a principle that all are zealous to preserve." *Pennekamp* v. *Florida,* 328 U.S. 331, 346 (1946). "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949). "Its [the Constitution] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689 (1959).

The foregoing indicates the contours of First Amendment freedoms. Freedom of expression is plainly important for the enhancement of human dignity, a means of assuring individual self-fulfillment. A rational self-fulfillment helps to shape individual judgments. Equally important is the recognition that the First Amendment was adopted to implement and facilitate the people's power to govern themselves. These two functions, self-fulfillment and societal participation, are the essential structures of the First Amendment. On the one hand, self-government means that

each individual in society must be free to think, reason, know, consider, appreciate and imagine. He must have the unfettered right to decide what he shall say and what he shall write, what he shall read, what he shall see, and what he shall hear. On the other hand, this thinking process involves more than political discussion; it includes all ideas, all information, art and literature, or any other communication which will help to educate the citizen for self-government. T. Emerson, The System of Freedom of Expression 6-9 (1969); A. Meiklejohn, The First Amendment Is an Absolute, Sup. Ct. Rev. 245, 262-263 (1961); Note, *Freedom to Hear: A Political Justification of the First Amendment,* 46 Washington L. Rev. 311 (1971); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 Geo. Wash. L. Rev. 429 (1971).

3. The exclusion of "obscene" speech from the marketplace of ideas has raised, and will continue to raise, major problems in the constitutional area of free speech and free press. See H. Kalven, Metaphysics of the Law of Obscenity, Sup. Ct. Rev. 1 (1960); *Ginzburg* v. *United States,* 383 U.S. 463, 478-481 (1966) (opinion of Justice Black); *id.* at 483 (opinion of Justice Douglas); *Memoirs* v. *Massachusetts,* 383 U.S. 413, 455-456 (1966) (opinion of Justice Harlan); *Jacobellis* v. *Ohio, supra* at 197 (opinion of Justice Stewart); *Redrup* v. *New York,* 386 U.S. 767, 770-771 (1967) (per curiam); *United States* v. *Reidel,* —— U.S. ——, 39 U.S. Law Week 4523, 4525 (1971) (opinion of Justice White).

These proceedings raise the question of whether the Court will go further and hold that each State is free to define "obscenity" as it desires. This states' rights argu-

ment is premised on the general view that Supreme Court review, under the Fourteenth Amendment, is limited only to the question of whether "the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power." *Roth* v. *United States, supra* at 501 (opinion of Justice Harlan). It is argued that the States' power to make speech criminal is confined by the Fourteenth Amendment only to the extent "as such power is inconsistent with our concepts of 'ordered liberty.'" *Ibid.* In the obscenity area, the argument continues, the interest of the federal government is "attenuated" and federal regulation must be weighed against the First Amendment. However, the States, it is urged, have "direct responsibility for the protection of the local moral fabric," and therefore should be permitted to regulate expression dealing with sex in a less restricted manner in the light of the allegedly lesser demands of the Fourteenth Amendment. *Id.* at 503-507.

The immediate answer to the foregoing would be that if the federal government has an "attenuated interest" in regulating any area of expression, then perhaps the federal government should not be regulating "obscenity" at all. Whether the federal government or the States should regulate "obscenity" is a question of allocation of governmental power unrelated to issues of the First Amendment. However, when we come to the question of what communication is entitled to the protective guarantees of the Constitution, a separate issue is presented. Here we deal with the question of the power of Government and the individual. "Surely there cannot be one idea of free speech essential to ordered liberty and binding on the states, and another idea of free speech, not so fundamental, but more stringent,

which inhibits the federal government alone. We are having enough difficulty working out one good theory of free speech without having the obligation now to develop two theories—one for the state level and one for the federal level." H. Kalven, The Negro and the First Amendment 34 (1965).

In *Roth,* Justice Brennan, writing for the majority of the Court, stated: "[W]e rejected, in this case, the argument that there is greater latitude for state action under the word 'liberty' under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment." 354 U.S. at 492, fn. 31. In *Jacobellis* v. *Ohio, supra,* in holding that the motion picture film there involved was not obscene and entitled to constitutional protection, Justice Brennan referred again to the requirement of ascertaining the "dim and uncertain line" that often separates obscenity from constitutionally protected expression,

> "It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the States as they do to the Federal Government was rejected in Roth-Alberts, supra, where the Court's single opinion applied the same standards to both a state and a federal conviction." 378 U.S. at 187, fn. 2.

Hence, the principle was reaffirmed that in "obscenity" cases, as in all others involving rights derived from the First Amendment guarantees of free expression, the Court "cannot avoid making an independent constitutional judg-

ment on the facts of the case as to whether the material involved is constitutionally protected." 378 U.S. at 190.

The belief that the States should be permitted to "experiment" on the basis of their own "community standards" is extremely alarming. It has not been accepted in other First Amendment areas such as libel law, where certain expression has been categorized as deserving of lesser constitutional protection. See *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). If accepted with regard to obscenity, the result would be the elimination of independent judicial review based on federal constitutional standards. Decision-making in the constitutional area would be controlled by concepts of state law. If States were permitted to infringe on constitutional freedoms by their own subjective standards, the fundamental political goal of self-government for which the Constitution was ordained and established would be defeated. Moreover, such a "watered-down version of constitutional rights," *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1966), would reverse the process of absorption of the specific freedoms of the first ten Amendments into the "liberty" guaranteed against state infringement by the Fourteenth Amendment. See, *e.g., Gitlow* v. *New York,* 268 U.S. 652, 666 (1925); *Pennekamp* v. *Florida, supra* at 335; *Gideon* v. *Wainwright,* 372 U.S. 335, 340-342 (1963); *Benton* v. *Maryland,* 395 U.S. 784, 793-796 (1969); *Malloy* v. *Hogan,* 378 U.S. 1, 4-11 (1964).

America is, of course, composed of different individuals and groups of individuals—social, political, economic, religious, ethnic and cultural. We are all, however, citizens of the United States living under a national Constitution. We have changed from a nation of farmers, shopkeepers and artisans into a vast, complex, industrial society. There

is a "common market" of concern which transcends state borders with respect to the meaning of freedom of speech and freedom of the press. The nation as a whole is concerned that education for self-government and self-realization shall be unimpaired, because it is now plain that the citizens of every State in the Union must be fully informed and mature if the country is to endure. "It is not true that a citizen of Massachusetts need not care if the citizens of Alabama are barred from reading certain books or seeing certain films; for there is a national—federal—interest in the level of education and culture achieved or possible in any part of the country." M. Konvitz, Expanding Liberties 220-221 (1966). Clearly, the status of individual expression under the Constitution cannot be determined by local tolerance. The standard of judgment of acceptability of expression must be a national one because it is "the fundamental and paramount law of the nation" which is being expounded. *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958).

It is plain that if the "rational" standard is accepted, such test will unquestionably result in widespread suppression of allegedly "obscene" materials at state and municipal levels. The unevenness of censorship permitted by a local standard would inevitably deter the dissemination of protected expression. The First Amendment guarantee fundamentally protects interstate and intrastate expression from the vagaries of local censorship and political opportunism. "There are village tyrants as well as village Hampdens." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943). Unless First Amendment standards are permitted to govern all attempted "obscenity" censorship in the United States, "a witch hunt might well come to pass which would make the Salem

tragedy fade into obscurity." *United States* v. *Klaw,* 350 F.2d 155, 170 (2 Cir. 1965). Publishers and producers of books, magazines, films, and other media of communication, cannot be expected to print or create separate editions of books or prints of film to satisfy police officers, prosecuting officials, censorship boards and private censorial groups in Youngstown, Ohio, Detroit, Michigan, Mobile, Alabama, Sioux City, Iowa, Grand Rapids, Michigan, and other parts of the country. Each "community" under such circumstances would censor literature and the arts for the entire country. See, Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 302-320 (1954); Newsletters on Intellectual Freedom, Intellecutal Freedom Committee of the American Library Association.

The statement in *Jacobellis,* therefore, with respect to the requirement of a national standard, reaffirms a principle essential to the maintenance and operation of our constitutional system:

> . . . Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed

> by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' Pennekamp v. Florida, supra, 328 U.S., at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding. 378 U.S. at 194-195.

See, Brennan, *The Bill of Rights and the States,* in The Great Rights 67-86 (Cahn Ed. 1963).

If the aim of self-government based upon the broadest freedoms of speech and press is to be achieved, the diversity among communities should be reconciled with the demands of the First Amendment in a manner quite different than that proposed by states' rights advocates. The rule should be, first, that if expression does not substantially exceed national standards, then such expression is plainly entitled to constitutional protection. However, local communities may permit a broader area of freedom of expression than even that which the First Amendment assumedly protects. Thus, before a communication can be suppressed, the proof should show beyond doubt, initially, that the particular expression exceeds the standards of the nation as a whole. If it does not, then clearly the material is entitled to constitutional protection. Addi-

tionally, however, if national standards are exceeded, it should still be open to the accused to show a broader toleration by the local community. In brief, a local community may tolerate what the nation, generally, does not, but a local community should not be permitted to suppress what the nation tolerates.[1]

These principles have been recognized by lower federal courts which have also warned against the danger that First Amendment values can be put to a vote or in other respects subject to local control. Thus, for example, in *Meyer* v. *Austin,* 319 F. Supp. 457 (M.D. Fla. 1970) (three-judge court), the question was whether Florida could refer to local community standards in regulating obscenity. The court's reply is appropriate:

> The constitutional necessity for a national, as opposed to a local, standard is apparent not only because "[i]t is, after all, a national Constitution we are expounding," *Jacobellis* v. *Ohio* . . ., but also because of the unevenness of censorship permitted by a local standard, making criminal to show in one part of the State, or of the nation, that which is legal in

[1] There is precedent on this issue. In the naturalization field, where questions of free speech and press were not even involved, the courts accepted the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks disfavorably upon such conduct." *In re Mayalls Naturalization,* 154 F. Supp. 556, 560 (E.D. Pa. 1957) (opinion by Chief Judge Ganey); see also, *In re Naturalization of Spak,* 164 F. Supp. 257, 259-260 (E.D. Pa. 1958).

another (an equal protection rationale), and because of the inevitable consequence of chilling the dissemination of protected expression (a First Amendment basis). Moreover, the national standard is not a national "average" of permissibility that would result in half of the nation being brought under the more repressive standards of the other half, thereby depriving that public of access to expression permitted in their own locale. Although the contours of the national standard may be imprecise, the First Amendment guarantee is a fundamental one that protects interstate (and intrastate) expression from the vagaries of local censorship and political opportunism. 319 F. Supp. at 466.

Similarly, in *United States* v. *35 MM Motion Picture Film Entitled "Language of Love"*, 432 F. 2d 705 (2d Cir. 1970), the Second Circuit, rejecting the contention that great deference should be paid to the verdict of the jury because it is the vehicle of public sentiment, rhetorically questioned whether,

> [i]n final analysis, is freedom of speech and expression, including exhibition of motion picture films, to be based on the opinions of 51 percent or even 80 percent of our populace? If so, it might well be that on a national plebiscite the "Language of Love", "I Am Curious (Yellow)", "Les Amants", "Memoirs", and others will all be condemned by a majority vote. Minorities would then read and see what their fellow men would decide to permit them to read and see. The shadow of "1984" would indeed be commencing to darken our horizon. 432 F. 2d at 715 (footnote omitted).

Professors Lockhart and McClure agree, rejecting "the validity of the assumption that the phrase 'contemporary community standards' refers to the standards of state or local communities". Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 110 (1960). The authors state that "the standards of society as a whole" are the only applicable constitutional standards, *id.* at 110, and view the concept of "local community standards" as a "dangerous expansive concept". *Id.* at 114. Another outstanding legal scholar has also argued against a double standard in the area of liberty of speech and press. Paul Freund argues that the standard of representative self-government should be the basic standard for judges in applying constitutional guarantees. He repeats the words of Dr. Meiklejohn that it is the "mutilation of the thinking process of the community" from which the First Amendment was designed to save us:

> "There is here, I believe, a useful analogue in the market place for goods, but the analogue is not the local market. Rather it is the concept of a national market, which no state can freely foreclose because the market involves outside interests that are not represented within the state. It is the federal system in the commercial realm which provides a parallel to the control of expression by the state, and the key is the concept of representation . . . No compact majority could act for all potential hearers, any more than one state can set a rule for others in the regulation of interstate commerce . . . For our purposes, it seems to me, the most useful reference point for limitations on fundamental freedoms is to be found by recurring to the analogy of the free national market safeguarded against local self-interest . . . If the court does require

a local government to turn square corners when it deals with interstate commerce or trade in ideas, it is vindicating its responsibility as the guardian of structure and process." Freund, The Supreme Court of the United States, 81-87 (paperback ed. 1961).[2]

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[2] In *In re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655 (1968), the California Supreme Court held, for the purposes of determining the obscenity of a theatrical "topless" dance, that "the relevant community" was the State of California. The court distinguished the particular "fact situation" in that case from books or films intended for nationwide dissemination. The court agreed that under such circumstances a "non-national community standard might well unduly deter expression in the first instance and thus run afoul of First Amendment guarantees." The topless dancing was described as subject matter "obviously not intended for nationwide dissemination." 72 Cal. Rptr. at 666.

It was suggested in *Giannini* that expert witnesses might be difficult to find to testify with respect to a nationwide standard. There does not appear to be much merit to this contention. It is, of course, true that the standard is imprecise; nevertheless, knowledge of what the nation tolerates can be as reasonably demonstrated by informed persons as the demonstration of state toleration. *Giannini* pointed to the statement by Judge Hand in *United States* v. *Kennerley*, 209 Fed. 119 (D.C.N.Y. 1913) which, protesting the old *Hicklin* rule, urged that the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which "the community have arrived here and now" (*ibid.*, 21). An examination of the entire passage indicates clearly that Judge Hand was not referring to the standards of state or local communities, but rather to the standards of society as a whole. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 110 (1960). It is submitted that the importance of invoking a national standard transcends the question of whether or not the particular expression is presented locally or disseminated throughout the country. A national standard is required in all cases in order to make certain that the restrictive standards of particular local communities in obscenity censorship will not reduce freedom of speech and press to the standards of those who "little understand them or appreciate their values." *Id.* at 114.

CONCLUSION

If there is to be freedom of speech and press anywhere, there must be freedom of speech and press everywhere. Any restriction on the right of citizens to freely express themselves, and the right of the public to hear and to be informed, must have a national justification; it cannot depend for its validity upon the capriciousness or whim of a "local community".

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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June 1971

SUPREME COURT OF THE UNITED STATES

Syllabus

MILLER *v.* CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

No. 70-73. Argued January 18-19, 1972—Reargued November 7, 1972—Decided June 21, 1973

Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the *Memoirs* plurality, it is *held* by the Court:

1. Obscene material is not protected by the First Amendment. *Roth* v. *United States*, 354 U. S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and taken as a whole, does not have serious literary, artistic, political, or scientific value. P. 9.

2. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth*, *supra*, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Pp. 9-10.

3. The test of "*utterly* without redeeming social value" articulated in *Memoirs*, *supra*, is rejected as a constitutional standard. P. 10.

Syllabus

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Pp. 15–19.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant, v. State of California. | On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (concurring and dissenting opinion) (1968).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by knowingly distributing obscene matter,[1] and the Appellate Department, Superior Court of Cali-

[1] At the time of the commission of the alleged offense, which was prior to June 25, 1969, § 311.2 (a) and § 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribu-

fornia, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited

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tion, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter, is guilty of a misdemeanor. . . ."

"§ 311. Definitions

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration."

"(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311 (e) of the California Penal Code, *supra*, was amended on July 25, 1969, to read as follows:

"(e) 'Knowingly' means being aware of the character of the matter or live conduct."

See Cal. Amended Stats. 1969, c. 249, § 1, p. 598. Despite petitioner's contentions to the contrary, the record indicates that the new § 311 (e) was not applied *ex post facto* to his case, but only the old § 311 (e) as construed by state decisions prior to the commission of the alleged offense. See *People* v. *Pinkus*, 256 C. A. 2d 941, 948–950 (App. Dept., Superior Court, Los Angeles, 1967); *People* v. *Campise*, 242 C. A. 2d 905, 914 (App. Dept., Superior Court, San Diego, 1966). Cf. *Bouie* v. *City of Columbia*, 378

advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material [2]

U. S. 347 (1944). Nor did § 311.2, *supra*, as applied, create any "direct, immediate burden on the performance of postal functions," or infringe on congressional commerce powers under Art. 1, § 8, cl. 3. See *Roth* v. *United States*, 354 U. S. 476, 494 (1957), quoting *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 96 (1945). See also *Mishkin* v. *New York*, 383 U. S. 502, 506 (1966); *Smith* v. *California*, 361 U. S. 147, 150–152 (1959).

[2] This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," *Roth* v. *United States*, 354 U. S. 476, 487 (1957), but the *Roth* definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin *obscaenus*, *ob*, to, plus *caenum*, filth, "obscene" is defined in the Webster's New

when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *Stanley* v. *Georgia*, 394 U. S. 557, 567 (1969). *Ginsberg* v. *New York*, 390 U. S. 629, 637–643 (1968). *Interstate Circuit, Inc.* v. *Dallas*, *supra*, 390 U. S., at 690 (1968). *Redrup* v. *New York*, 386 U. S. 767, 769 (1967). *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964). See *Rabe* v. *Washington*, 405 U. S. 313, 317 (1972) (BURGER, C. J., concurring); *United States* v. *Reidel*, 402 U. S. 351, 360–362 (MARSHALL, J., concurring) (1971); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502 (1952). *Breard* v. *Alexandria*, 341 U. S. 622, 644–645 (1951); *Kovacs* v. *Cooper*, 336 U. S. 77, 88–89 (1949); *Prince* v. *Massachusetts*, 321 U. S. 158, 169–170 (1944). Cf. *Butler* v. *Michigan*, 352

International Dictionary (Unabridged, 3d ed., 1969) as "1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle." The Oxford English Dictionary (1933 ed.) gives a similar definition, "offensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (*pornè*, harlot, and *graphos*, writing). The word now means "1: a description of prostitutes or prostitution. 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's New International Dictionary, *supra*. Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the *Roth* case, *i. e.*, obscene material "which deals with sex." *Roth*, *supra*, 354 U. S., at 487. See also A. L. I. Model Penal Code, § 251.4 (1) "Obscene Defined." (Official Draft, 1962.)

U. S. 380, 382–383 (1957); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464–465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of MR. JUSTICE BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In *Roth* v. *United States*, 354 U. S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572.
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> "'. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been

thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .*' [Emphasis by Court in *Roth* opinion.]

"We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U. S., at 484–485 (footnotes omitted).

Nine years later in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition:

"'. . . as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'" *Id.*, 383 U. S., at 418.

The sharpness of the break with *Roth*, represented by the third element of the *Memoirs* test and emphasized by JUSTICE WHITE's dissent, *id.*, 383 U. S., at 460–462, was further underscored when the *Memoirs* plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be pro-

scribed unless it is found to be *utterly* without redeeming social value." (Emphasis in original.) 383 U. S., at 419.

While *Roth* presumed "obscenity" to be "utterly without redeeming social value," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i. e.*, that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Justice Harlan to wonder if the "*utterly* without redeeming social value" test had any meaning at all. See *Memoirs* v. *Massachusetts*, *supra*, 383 U. S., at 459 (1966) (Harlan, J., dissenting). See also *id.*, 383 U. S., at 461 (WHITE, J., dissenting); *United States* v. *Groner*, — F. 2d — (slip opinion, at pp. 5–8) (May 22, 1973) (CA5 1973).

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, *e. g.*, *Redrup* v. *New York*, 386 U. S. 767, 770–771 (1967). We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted]." *Interstate Circuit, Inc.* v. *Dallas*, *supra*, 390 U. S., at 704–705 (1968) (Harlan, J., concurring and dissenting).[3] This is not remarkable, for

[3] In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected

in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra*. But now the *Memoirs* test has been abandoned as unworkable by its author[4] and no member of the Court today supports the *Memoirs* formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois* v. *Wisconsin*, 408 U. S. 229 (1972). *United States* v. *Reidel*, 402 U. S. 351, 354 (1972). *Roth* v. *United States*, 354 U. S. 476, 485 (1957).[5] "The First

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by the First Amendment. *Redrup* v. *New York*, 386 U. S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy." See *Walker* v. *Ohio*, 398 U. S. 434, 434–435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

[4] See the dissenting opinion of MR. JUSTICE BRENNAN in *Paris Adult Theatre I* v. *Slaton*, — U. S. —, ——— (1973).

[5] As Chief Justice Warren stated, dissenting, in *Jacobellis* v. *Ohio*, *supra*, 378 U. S., at 200 (1963):

"For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule."

and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." *Breard* v. *Alexandria, supra*, 341 U. S. 622, at 642 (1951), and case cited. See *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 47–50 (1961); *Joseph Burstyn, Inc.* v. *Wilson, supra*, 343 U. S., at 502 (1952). We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc.* v. *Dallas, supra*, 390 U. S., at 682–685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin, supra*, 408 U. S., at 230 (1972), quoting *Roth* v.

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[6] See, *e. g.*, Oregon Laws 1971, c. 743, Art. 29, §§ 255–262, and Hawaii Penal Code, Tit. 37, §§ 1210–1216, 1972 Hawaii Session Laws, pp. 126–129, Act. 9, Pt. II, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See *United States* v. *12-200 Ft. Reels Film*, — U. S. — (p. 7, n. 7) (1973).

United States, supra, 354 U. S., at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the *"utterly* without redeeming social value" test of *Memoirs* v. *Massachusetts, supra,* 383 U. S., at 419 (1966); that concept has never commanded the adherence of more than three Justices at one time.[7] See pp. 6–7, *supra.* If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois* v. *Wisconsin, supra,* 408 U. S., at 232 (1972); *Memoirs* v. *Massachusetts, supra,* 383 U. S., at 459–460 (1966) (Harlan, J., dissenting); *Jacobellis* v. *Ohio,* 378 U. S. 184, 204 (1964) (Harlan, J., dissenting); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 284–285 (1964); *Roth* v. *United States, supra,* 354 U. S., at 497–498 (1957) (Harlan, J., concurring and dissenting).

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, *supra:*

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[7] "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ." *Kois* v. *Wisconsin, supra,* 408 U. S., at 231 (1972). See *Memoirs* v. *Massachusetts, supra,* 383 U. S., at 461 (1966) (WHITE, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See *id.,* at 462 (WHITE, J., dissenting).

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places.[8] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See *Kois* v. *Wisconsin, supra,* 408 U. S., at 230–232 (1972); *Roth* v. *United States, supra,* 354 U. S., at 487 (1957); *Thornhill* v. *Alabama, supra,* 310 U. S. 88, 101–102 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we

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[8] Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be "sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See *California* v. *LaRue,* 409 U. S. 109, 117–118 (1972).

do with rape, murder and a host of other offenses against society and its individual members.[6]

MR. JUSTICE BRENNAN, author of the opinions of the Court, or the plurality opinions, in *Roth* v. *United States*, *supra*, *Jacobellis* v. *Ohio*, *supra*, *Ginzburg* v. *United States*, 383 U. S. 463 (1966), *Mishkin* v. *New York*, 383 U. S. 502 (1966), and *Memoirs* v. *Massachusetts*, *supra*, has abandoned his former positions and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, *Paris Adult Theatre* v. *Slaton*, — U. S. — (1973) (BRENNAN, J., dissenting). Paradoxically, MR. JUSTICE BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or con-

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[6] The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth* v. *United States*, *supra*, 354 U. S., at 492, n. 30 (1957), "[I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States*, 165 U. S. 486, 499–500."

strued. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth* v. *United States*, *supra*, 354 U. S., at 491–492 (1957). Cf. *Ginsberg* v. *New York*, *supra*, 390 U. S., at 643 (1969).[10] If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, MR. JUSTICE DOUGLAS contends. As to MR. JUSTICE DOUGLAS' position, see *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363, 379–380 (1971) (dissenting opinion of Black, J., joined by DOUGLAS, J.); *Ginzburg* v. *United States*, 383 U. S. 463, 476, 491–492 (1966) (dissenting opinions of

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[10] As MR. JUSTICE BRENNAN stated for the Court in *Roth* v. *United States*, *supra*, 354 U. S., at 491–492 (1957).

"Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo*, 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.*, at 7. See also *United States* v. *Harriss*, 347 U. S. 612, 624, n. 15; *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340; *United States* v. *Ragen*, 314 U. S. 513, 523–524; *United States* v. *Wurzbach*, 280 U. S. 396; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *Fox* v. *Washington*, 236 U. S. 273; *Nash* v. *United States*, 229 U. S. 373."

Black, J., and DOUGLAS, J.); *Jacobellis* v. *Ohio*, 378 U. S. 184, 196 (1964) (concurring opinion of Black, J., joined by DOUGLAS, J.); *Roth*, *supra*, 354 U. S., at 508–514 (1957) (dissenting opinion of DOUGLAS, J.). In this belief, however, MR. JUSTICE DOUGLAS now stands alone.

MR. JUSTICE BRENNAN also emphasizes "institutional stress" in justification of his change of view. Noting that "the number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court," he quite rightly remarks that the examination of contested materials "is hardly a source of edification to members of this Court." *Paris Adult Theatre* v. *Slaton*, *supra*, — U. S., at — (1973) (BRENNAN, J., dissenting). He also notes, and we agree, that "uncertainty of the standards creates a continuing source of tension between state and federal courts . . . ." "The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." *Id.*, at —.

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup* v. *New York*, *supra*, and attempt to provide positive guidance to the federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because

it will lighten our burdens.[11] "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis* v. *Ohio, supra,* 378 U. S., at 187–188 (1964) (opinion of BRENNAN, J.). Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See *Roth* v. *United States, supra,* 354 U. S., at 482–485 (1957). "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.,* [*Roth* v. *United States, supra,* 354 U. S.] at 498; see *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 488 (opinion of Harlan, J.) [footnote omitted]." *Jacobellis* v. *Ohio, supra,* 378 U. S., at 188 (1964) (opinion of BRENNAN, J.).

III

Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are

[11] We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency" it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards [12] or to the in-

[12] The record simply does not support petitioner's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California "community standards." The expert, a

structions of the trial judge on "state-wide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. Chief Justice Warren pointedly commented in his dissent in *Jacobellis* v. *Ohio, supra,* 378 U. S., at 200:

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[13]

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police officer with many years of specialization in obscenity offenses, had conducted an extensive state-wide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testimony was certainly not constitutional error. Cf. *United States* v. *Augenblick,* 393 U. S. 348, 356 (1969).

[13] In *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), two Justices argued that application of "local" community standards would run the risk of proventing dissemination of materials in some places because sellers

See *Hoyt* v. *Minnesota*, 399 U. S. 524–525 (1970) (BLACKMUN, J., dissenting); *Walker* v. *Ohio*, 398 U. S. 434 (1970) (BURGER, C. J., dissenting); *id.*, 398 U. S., at 434–435 (Harlan, J., dissenting); *Cain* v. *Kentucky*, 397 U. S. 319 (1970) (BURGER, C. J., dissenting); *id.*, 397 U. S., at 319–320 (Harlan, J., dissenting); *United States* v. *Groner*, — F. 2d — (slip opinion, at 8–14) (May 22, 1973) (CA5 1973). O'Meara, Shaffer, Obscenity in The Supreme Court: A note on *Jacobellis* v. *Ohio*, 40 Notre Dame Law., 1, 6–7. See also *Memoirs* v. *Massachusetts*, 383 U. S. 413, 458 (1966) (Harlan, J., dissenting).

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would be unwilling to risk criminal conviction by testing variations in standards from place to place. *Id.*, 378 U. S., at 193–195 (opinion of BRENNAN, J., joined by Goldberg, J.). The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Justice Harlan often emphasized. See *Roth* v. *United States*, *supra*, 354 U. S., at 506 (1957).

Petitioner also argues that adherence to a "national standard" is necessary "in order to avoid unconscionable burdens on the free flow of interstate commerce." As noted before, p. 3, n. 1, *supra*, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. 1, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Petitioner's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. See, *e. g.*, *Head* v. *New Mexico Board*, 374 U. S. 424 (1963); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960); *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525 (1949); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Baldwin* v. *G. A. F. Seeling, Inc.*, 294 U. S. 511 (1935); *Sligh* v. *Kirkwood*, 237 U. S. 52 (1915).

Jacobellis v. *Ohio*, *supra*, 378 U. S., at 203–204 (1964) (Harlan, J., dissenting). *Roth* v. *United States*, *supra*, 354 U. S. 476, 505–506 (1957) (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin* v. *New York*, 383 U. S. 502, 508–509 (1966), the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See *Roth* v. *United States*, *supra*, 354 U. S., at 489 (1957). Compare the now discredited test in *Regina* v. *Hicklin* [1868] L. R. 3 Q. B. 360. We hold the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.[14]

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[14] Appellant's jurisdictional statement contends that he was subjected to "double jeopardy" because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that once material has been found not to be obscene in one proceeding, the State is "collaterally estopped" from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a "double jeopardy" claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived at California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, at least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant's contention, therefore,

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press . . . ." *Breard* v. *Alexandria*, 341 U. S. 622, 645 (1951). The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, *supra*, 354 U. S., at 484 (1957) (emphasis added). See *Kois* v. *Wisconsin*, *supra*, 408 U. S., at 230–232 (1972); *Thornhill* v. *Alabama*, *supra*, 310 U. S., at 101–102 (1940). But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[15]

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see *Roth* v. *United States*, *supra*, 354 U. S., at 482–485 (1957), in

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is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. See *Mishkin* v. *New York*, 383 U. S. 502, 512–514 (1966).

[15] In the apt words of Chief Justice Warren, the petitioner in this case was "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all that we need to decide." *Roth* v. *United States*, 354 U. S., at 496 (1957) (concurring opinion).

anyway limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period" not just in economics and politics, but in *belles lettres* and in "the outlying fields of social and political philosophies." [16] We do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and "repression" of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

MR. JUSTICE BRENNAN finds "it is hard to see how state-ordered regimentation of our minds can ever be forestalled." *Paris Adult Theatre I* v. *Slaton, supra,* — U. S., at — (1973) (BRENNAN, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard core pornography so as to make it unavailable to nonadults, a regulation which MR. JUSTICE BRENNAN finds constitutionally permissible, has all the elements of "censorship" for adults; indeed

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[16] See Parrington, Main Currents in American Thought, vol. 2, p. *ix, & et seq.* As to the latter part of the 19th century, Parrington observed "A new age had come and other dreams—the age and dreams of a middle class sovereignty . . . . From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War." *Id.*, vol. 2, at 474. Cf. Morison, Commager, and Leuchtenburg, The Growth of the American Republic (6th ed., 1969), vol. 2, at 197–233; Paths of American Thought (Schlesinger, White ed., 1963 ed.), 123–166, 203–290 (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and Wish, Society and Thought in Modern America (1952 ed.), 337–386.

even more rigid enforcement techniques may be called for with such dichotomy of regulation. See *Interstate Circuit* v. *Dallas*, *supra*, 390 U. S., at 690 (1968).[17] One can concede that the "sexual revolution" of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment, (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "*utterly* without redeeming social value," and (c) hold that obscenity is to be determined by applying "contemporary community standards," see *Kois* v. *Wisconsin*, *supra*, 408 U. S., at 230 (1972), and *Roth* v. *United States*, *supra*, 354 U. S., at 489 (1957), not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See *United States* v. *12 200-Ft. Reels*, — U. S. —, — (p. 7, n. 7) (1973).

Vacated and remanded for further proceedings.

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[17] "[W]e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg* v. *New York*, . . . [390 U. S. 629 (1968)]." *Interstate Circuit, Inc.* v. *Dallas*, *supra*, 390 U. S., at 690 (1968) (footnote omitted).

SUPREME COURT OF THE UNITED STATES

No. 70-73

Marvin Miller, Appellant, *v.* State of California. | On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I

Today we leave open the way for California [1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. In *Roth* v. *United States*, 354 U. S. 476, it ruled that "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.*, at 487 Obscenity, it was said, was rejected by the First Amendment because it is "utterly without redeeming social value" *Id.*, at 484. The presence of a "prurient interest" was to be determined by "contemporary community standards." *Id.*, at 489. That test, it has been said, could not be determined by one standard here and another standard there, *Jacobellis* v. *Ohio*, 378 U. S.

[1] California defines "obscene matter" as "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." Calif. Penal Code § 311 (a).

184, 194, but "on the basis of a national standard." *Id.*, at 195. My Brother STEWART in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to define what may be indefinable." *Id.*, at 197.

In *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418, the *Roth* test was elaborated to read as follows: ". . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In *Ginzburg* v. *United States*, 383 U. S. 463, a publisher was sent to prison not for the kind of books and periodicals he sold but for the manner in which the publications were advertised. The "leer of the sensualist" was said to permeate the advertisements. *Id.*, at 468. The Court said, "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." *Id.*, at 470. As Justice Black said in dissent, ". . . Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal." *Id.*, at 476. That observation by Mr. Justice Black is underlined by the fact that the *Ginzburg* decision was five to four.

A further refinement was added by *Ginzburg* v. *New York*, 390 U. S. 629, 641, where the Court held that "it was not irrational for the legislature to find that exposure to material condemned by the statutes is harmful to minors."

But even those members of this Court who had created

the new and changing standards of "obscenity" could not agree on their application. And so we adopted a *per curiam* treatment of so-called obscene publications that seemed to pass constitutional muster under the several constitutional tests which had been formulated. See *Redrup* v. *New York*, 386 U. S. 767. Some condemn it if its "dominant tendency might be to deprave or corrupt a reader." [2] Others look not to the content of the book but to whether it is advertised "to appeal to the erotic interests of customers." [3] Some condemn only "hard-core pornography"; but even then a true definition is lacking. It has indeed been said of that definition, "I could never succeed in [defining it] intelligibly," but "I know it when I see it." [4]

Today we would add a new three-pronged test: "(1) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeal to the prurient interest, . . . (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Those are the standards we ourselves have written into the Constitution.[5] Yet how under these vague tests can

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[2] *Roth* v. *United States*, 354 U. S. 476, 502 (Harlan, J.).

[3] *Ginzburg* v. *United States*, 383 U. S. 463, 467.

[4] *Jacobellis* v. *Ohio*, 378 U. S. 184, 197.

[5] At the conclusion of a two-year study, the U. S. Commission on Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected materials:

"Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community standards,' and lacks 'redeeming

we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well-intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with problems of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts.

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social value.' These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause intereference with the communication of constitutionally protected materials." Report of the Commission on Obscenity and Pornography 59 (1970).

If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as if and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in *Ginzburg* and has all the evils of an *ex post facto* law.

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. As Mr. Justice Harlan has said:

> "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." *Interstate Circuit* v. *Dallas*, 390 U. S. 676, 707.

In *Bouie* v. *City of Columbia*, 378 U. S. 347, we upset a conviction for remaining on the property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no "fair warning, at the time of their conduct" while on the property "that the act for which they now stand convicted was rendered criminal" by the state statute. *Id.*, at 355. The same requirement of "fair warning" is due here, as much as in *Bouie*. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow

men to go to prison or be fined when they had no "fair warning" that what they did was criminal conduct.

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does[6] and my views on the issue have been stated over and again.[7] But at

[6] It is said that "obscene" publications can be banned on authority of restraints on communications incident to decrees restraining unlawful business monopolies or unlawful restraints of trade, *Sugar Institute* v. *United States*, 297 U. S. 553, 597, or communications respecting the sale of spurious or fraudulent securities. *Hall* v. *Gerger-Jones Co.*, 242 U. S. 539, 549, *et seq.*; *Caldwell* v. *Sioux Fall Stock Yards Co.*, 242 U. S. 559, 567; *Merrick* v. *Halsey & Co.*, 242 U. S. 568, 584. The First Amendment answer is that whenever speech and conduct are brigaded—as they are when one shouts "Fire" in a crowded theatre—speech can be outlawed. Justice Black, writing for a unanimous Court in *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, stated that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. Justice Black said: "It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of valid criminal statute. We reject the contention now." *Id.*, at 498.

[7] See *United States* v. *12 200-Ft. Reels of Film*, *post*, at —; *United States* v. *Orito*, *post*, at —; *Kois* v. *Wisconsin*, 407 U. S. —; *Byrne* v. *Karalexis*, 396 U. S. 976, 977; *Ginsberg* v. *New York*, 390 U. S. 629, 650; *Jacobs* v. *New York*, 388 U. S. 431, 436; *Ginsburg* v. *United States*, 383 U. S. 463, 482; *Memoirs* v. *Massachusetts*, 383 U. S. 413, 424; *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 72; *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, 78; *Smith* v. *California*, 361 U. S. 147, 167; *Kingsley Pictures Corp.* v. *Regents*,

least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.[8]

No such protective procedure has been designed by California in this case. Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive.

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360 U. S. 684, 697; *Roth* v. *United States*, 354 U. S. 476, 508; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 446; *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587, 588; *Gelling* v. *Texas*, 343 U. S. 960.

[8] The Commission on Obscenity and Pornography has advocated such a procedure:

"The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorising prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions . . . .

"A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is an existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for any threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of the Commission on Obscenity and Pornography 70–71 (1970).

That was the basis of my dissent in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 467 (1952), where I protested against making a streetcar audience a "captive" audience. There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter news stands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are "offensive" to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed "to invite dispute," to induce "a condition of unrest," to "create dissatisfactions with conditions as they are," and even to stir "people to anger." *Terminiello* v. *Chicago*, 337 U. S. 1, 4. The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard "offensive" gives authority to government that cuts the very vitals out

of the First Amendment.[9] As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be "offensive" to some.

The standard "offensive" is unconstitutional in yet another way. In *Coates* v. *Cincinnati*, 402 U. S. 611, we had before us a municipal ordinance that made it a crime for three or more persons to assemble on a street and conduct themselves "in a manner annoying to persons passing by." We struck it down, saying "If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right

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[9] Obscenity law has had a capricious history:

"The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's *Queen Mab* and the decorous promulgation of pantheistic ideas, on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime." Chafee, Free Speech in the United States (1942), p. 151.

of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.*, at 614.

How we can deny Ohio the convenience of punishing people who "annoy" others and allow California power to punish people who publish materials "offensive" to some people is difficult to square with constitutional requirements.

If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end. There are societies where religion and mathematics are the only free segments. It would be a dark day for America if that were our destiny. But the people can make it such if they choose to write obscenity into the Constitution and define it.

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant,
v.
State of California.

On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

In my dissent in *Paris Adult Theatre* v. *Slaton*, *post*, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, petitioner was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Slaton*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.* "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing

*Cal. Penal Code § 311.2 (a) provides that "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into the state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " *Gooding* v. *Wilson*, 405 U. S. 518, 521 (1972), quoting from *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965). See also *Baggett* v. *Bullitt*, 377 U. S. 360, 366 (1964); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 616 (1971); *id.*, at 619–620 (WHITE, J., dissenting); *United States* v. *Raines*, 362 U. S. 17, 21–22 (1960); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Since my view in *Paris Adult Theatre* represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a "readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution," *Dombrowski* v. *Pfister*, *supra*, at 491, I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion. See *Coates* v. *City of Cincinnati*; *supra*, at 616.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-73

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

To the Honorable Presiding Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a petition for rehearing from the order and decision of this Court, dated June 21, 1973, vacating and remanding the judgment of the Superior Court for the County of Orange.

REASONS FOR GRANTING A PETITION FOR REHEARING

I

DEVELOPMENTS IN THE CALIFORNIA COURTS SUBSEQUENT TO JUNE 21, 1973, ILLUSTRATE THAT THE MAJORITY OPINION OF THIS COURT, ON ITS FACE, AND BOTH IN THE SUBSTANTIVE AND PROCEDURAL ASPECTS THEREOF, CANNOT BE UNDERSTOOD, NOR APPLIED, AND IS SO VAGUE THAT PERSONS OF COMMON INTELLIGENCE ARE NOT AWARE OF WHAT ASPECTS OF FREE SPEECH, PRIVACY AND LIBERTY ARE PROTECTED AGAINST GOVERNMENTAL INTRUSION BY THE FIRST, FOURTH, FIFTH, NINTH, TENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II

FOR THE REASONS SET FORTH IN THE BRIEFS OF AMICUS CURIAE AND THE BRIEFS OF COUNSEL IN COMPANION CASES ON PETITION FOR REHEARING, ALL OF WHICH ARE ADOPTED HEREIN AS THOUGH FULLY SET FORTH AT LENGTH, THE REHEARING SHOULD BE GRANTED, IN THE INSTANT CASE, AND THE JUDGMENT OF CONVICTION SET ASIDE.

III

FOR THE REASONS SET FORTH IN THE DISSENTING OPINION OF THIS HONORABLE COURT, THE REHEARING SHOULD BE GRANTED AND THE CONVICTION SET ASIDE.

IV

THE PROSECUTION WAS ESTOPPED FROM PROCEEDING

AGAINST DEFENDANT AND PETITIONER HEREIN, AND THE RECORD AFFIRMATIVELY DEMONSTRATES THAT ISSUES HAD BEEN PRESENTED TO THE TRIAL AND APPELLATE COURTS BELOW.

ARGUMENT

I

Developments Subsequent To This Court's Decision On June 21, 1973, In California Alone, Demonstrate That The Majority Opinion Cannot Be Understood, Much Less Applied.

Petitioner submits that although in California the Penal Code sections dealing with obscenity have been unconstitutional by the majority in this case, the California courts—including the California Supreme Court—have taken the following positions:

1. Declared the Statute unconstitutional (Los Angeles Superior Court, *People v. Bloom*, Case No. A282,816, the Honorable Judge Dell, July 10, 1973).

2. Declared the Statute *constitutional* (Los Angeles Municipal Court Case Nos. M31448274 and M31448275, *People v. Jaime Silva, et al.*, and *People v. James N. Hill, et al.*, respectively, Honorable Michael T. Sauer, Judge Presiding). (See Habeas Corpus Criminal No. 17031 [annexed hereto as an appendix]; Beverly Hills Municipal Court Case Nos. M34540, M34539, *People v. Miranda*, the Honorable Leonard Wolf, Judge Presiding, July 11, 1973.)

3. Refused to pass on the issue or to "authoritatively

construe" the Statute (*In re Jaime Silva, etc., et al.*, California Supreme Court, Habeas Corpus Criminal No. 17031, Petition for Writ of Habeas Corpus denied, July 12, 1973).

In the latter case, the California Supreme Court declined to "authoritatively construe" the Statute, even though the aforedescribed lower California courts have taken the contrary positions that the Statute had and had not been "authoritatively construed" by the California Supreme Court. This Court's attention is directed to the contradictory cases of *People v. Noroff*, 67 Cal. 2d 791 (1967), and *In re Panchot*, 70 C. 2d 105 (1968), both decided by the California Supreme Court, which are contradictory insofar as the majority opinion is concerned, this case dealing with "that particular subject of authoritative construction" and "specific" description of matter which is to be suppressed.

As indicated, a copy of the Petition for a Writ of Habeas Corpus, filed with the California Supreme Court, above described, is attached hereto, and its contents, allegations and authorities in support thereof are incorporated herein as though fully set forth at length.

In sum, the Court of Last Resort in the State of California has refused to authoritatively construe its own Penal Statute, even though that instruction is mandated by this Court.

II

The Prosecution Of The Instant Case Was Estopped Under The Doctrine Of *Ashe v. Swenson*, 397 U.S. 436 (1969), And *Waller v. Florida*, 397 U.S. 387 (1970).

This Court indicated in its footnote that the record

did not sustain the challenge of prior judicial determination of the "non-obscenity" of the materials herein prosecuted. Counsel believes that the Court overlooked the plain fact that the prior decision and order of Judge Arguelles was presented to the trial court before trial, on a Motion to Dismiss, and the argument of "estoppel" was presented to the Orange County Superior Court, Appellate Department (see Clerk's Transcript, pp. 17-21).

CONCLUSION

The undersigned counsel argued to this Court, on oral argument, that whether National or Local standards were to be declared by this Court as "constitutional," the courts below, as usual, would fail to abide by this Court's decision and, rather, would heed their respective viscera. The prophesy is fulfilled, and Job's lament is recalled (3, 25):

> "For the thing which I greatly feared has come upon me, and that which I was afraid of is come unto me."

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN & SCHWARTZ

Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned counsel, being a member of the bar of this Court, certifies that this Petition for Rehearing is presented in good faith and is not for the purpose of delay.

.....

BURTON MARKS

APPENDIX

PETITION FOR WRIT OF HABEAS CORPUS
HC CRIM. 17031

In the Supreme Court of the State of California.

Case Below: LAMC Nos. 31448274, 31448275.

In the matter of the Application of BURTON MARKS, Petitioner, On Behalf of, JAIME SILVA, CELIA IBARRA SANTOS, LUIS IBARRA LEPE, FONTY WAYNE FLACK, JAMES NORMAN HILL, CANDY CYNTHIA KILBY, STEVEN WILLIAM LEACH, ARBEN NEAL WITT.

To the Honorable Presiding Justice and Associate Justices of the Supreme Court of the State of California:

Your Petitioner respectfully alleges as follows:

1. That your Petitioner is the attorney for the prisoners, SILVA, SANTOS, LEPE, FLACK, HILL, KILBY, LEACH, and WITT, for whom this Petition has been filed.

2. That each of the said prisoners are being illegally held, in the constructive custody, confinement or restraint of Peter J. Pitchess, Sheriff for the County of Los Angeles at Los Angeles, in the County of Los Angeles.

3. That criminal complaints, nos. 31448274 and 31448275, were filed in the Municipal Court of the Los Angeles Judicial District, charging all prisoners with violations of Penal Code § 311.2.[1] Each of the prisoners were arrested after the issuance of arrest warrants on the said complaints, and were arraigned in Division 80, of the Los Angeles Municipal Court on June 27, 1973.

[1]Both complaints involve the same incidents; all defendants being employees of the same film processing corporation. The decision to divide the defendants into two groups appears to have originated in the City Attorney's office.

4. On said date and in said Division, Motions were made on behalf of each prisoner/defendant to dismiss the complaints on the grounds that the statute, § 311.2, was unconstitutional in light of *Miller v. California,* 13 CRL, 3161 (decided June 20, 1973).

5. The Motions to Dismiss were denied and upon their plea of not guilty, Defendants were ordered to appear for trial in Division 40, Los Angeles Municipal Court, on July 19, 1973. All Defendants are at liberty on bond.

6. That the arrest, detention and confinement and restraint of the Defendants is illegal and unlawful in that each are being prosecuted under a statute which is unconstitutional and void, in violation of Amendments I and XIV of the United States Constitution, in that said statute, Penal Code § 311.2 fails to specifically define that sexual conduct which, if depicted or described in a patently offensive manner, constitutes a crime, in the State of California; and that further, said statute has not been so construed, authoritatively, by this Honorable Court.

7. That no other application for a Writ of Habeas Corpus or a warrant in lieu thereof has been made, by or on behalf of said persons in regard to said restraint.

WHEREFORE your Petitioner prays that a Writ of Habeas Corpus be issued, directed to the Honorable Peter J. Pitchess, Sheriff for the County of Los Angeles, commanding him to have said prisoners before this Court, at a time and place therein to be specified, to do and receive what shall then and there be considered by this Court, concerning the persons so restrained.

Petitioner further prays that pending hearing on this Petition for Writ of Habeas Corpus, that a Stay Order issue

out, and under the Seal of this Court, staying further criminal proceedings in the Los Angeles Municipal Court case Nos. 31448274 and 31448275.

DATED: June 28, 1973.

BURTON MARKS

Verification

State of California)
ss.
County of Los Angeles)

I am the Petitioner in the above entitled action; I have read the foregoing PETITION FOR WRIT OF HABEAS CORPUS and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 1973, at Beverly Hills, California.

BURTON MARKS

Points and Authorities

This is a Writ of Habeas Corpus invoking the original jurisdiction of this Court, on Habeas Corpus (California

Constitution, Article VI, § 10) to declare § 311 and § 311.2 of the California Constitution, unconstitutional and void in violation of Amendments I and XIV to the United States Constitution in that said statutes do not meet the First Amendment standards of specificity set forth in *Miller v. California,* 13 CrL 3161 and the related cases all decided on June 20, 1973, by the United States Supreme Court. (*Paris Adult Theatres v. Slaton,* 13 CrL 3171; *U. S. v. Orito,* 13 CrL 3192; *Kaplan v. California,* 13 CrL 3194; *U. S. v. 12,000 200-Ft. Reels of Super 8MM Film,* 13 CrL 3197).

This Petition for Writ of Habeas Corpus is brought, in addition, under the authority of *Ramirez v. Brown,* 9 C.3d 199, in that it is a case which, "poses a question which is of broad public interest, is likely to recur and should receive uniform resolution throughout the state" (9 C.3d 203).

In the interpretation and construction of California statutes, the California Supreme Court has final authority, and the United States Supreme Court will accept the determination of the California Supreme Court. *Quong Ham Wah Co. v. Ind. Acc. Com.,* 255 U.S. 445 (1921).

Miller v. California, supra, and *U. S. v. 12,000 200-Ft. Reels, supra,* (footnote 7), have mandated, review by this Court to determine whether or not the California legislative definition of "obscenity" can be reasonably construed to include only as regulating material, "to patently offensive representations or descriptions of . . . 'hardcore' sexual conduct . . . "

In the alternative, the United States Supreme Court has mandated that this Court declare whether such a construction has heretofore been placed upon the statutes so

as to assure that there has been a careful limitation in the regulation of obscene materials limited to regulation of works which depict or describe specifically defined sexual conduct.

Parenthetically, it is submitted that this Court must also determine whether or not §§ 311 *et seq.* of the California Penal Code are limited to "works which, taken as a whole, appeal to the purient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value". *Miller* at 3163. (Query: Why did the majority leave out "educational"? Taking the first letters of the words "literary", "artistic", "political" and "scientific", we get "LAPS". If "educational" were added, we would get "LAPSE", which might more accurately describe the majority opinion.)

It is submitted that the definition of "obscene" under § 311(a) of the California Penal Code is constitutionally deficient and cannot be cured by construing the statute to mean certain types of specific sexual conduct. Mr. Justice Burger gave us two examples of types of Penal statutes regulating "obscenity" which would be constitutionally sufficient (*Miller* at 3164):

(a) Patently offensive representations or descriptions of ultimate sexual act, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

Arguably, under this Court's decision in *Noroff*, 67 C.2d 791 (1967), construction (a) might be deemed accept-

able. However, compare *Noroff* with *In re Panchot*, 70 C.2d 105 (1968), and we find that the portion of "lewd exhibition of the genitals" has been specifically held by this Court to *not* be included within the definition of "obscene" in the State of California. The closest that this Court has come to the Burger definition is to describe obscene to include only "graphic depictions" of sexual conduct (*Noroff*) . . . certainly not "specific" as required in *Miller* and the companion cases.

The ultimate conclusion therefore, is that insofar as Penal Code § 311(a) defines "obscenity" in the standard "*Roth*" manner, that its constitutional deficiencies cannot be cured by a judicial "construction" which defines certain types of sexual conduct as being prohibited.

Obviously, this type of judicial "construction" would in effect be "judicial legislation" trying to anticipate that sexual conduct which the legislature does not want depicted. This Court, itself, has stated that it cannot engage in judicial legislation. A statute cannot be rewritten wholesale, in order to make it constitutional. See *People v. Stevenson*, 58 C.2d 794, 798 (1962).

Finally, since the arrest of the prisoners was made prior to the pronouncements of June 20, 1973, as to First Amendment requirements for specificity of state statutes, any construction of the statute which would hold the instant Defendants liable for violation of the statute, would necessarily be *Ex Post Facto* and "constitutionally inappropriate". U. S. Constitution, Article I, § 9, § 10; California Constitution, Article I, § 16.

Conclusion

The effect of the recent Supreme Court decisions has been to render the California Obscenity Statutes unconstitutional and void, in violation of Amendments I and XIV to the United States Constitution. They cannot be revitalized by any sort of judicial construction, since this type of judicial legislation could only serve to further cloud the issue, rather than being more specific.

This Petition for Writ of Habeas Corpus should be granted, and the prisoners ordered discharged from custody.

Respectfully submitted,

MARKS, SHERMAN & SCHWARTZ

By BURTON MARKS

[Declaration of service annexed showing service on June 29, 1973, of the within document, as follows:

PETER J. PITCHESS
Sheriff, Los Angeles County
Hall of Justice
211 West Temple Street
Los Angeles, California 90012

CITY ATTORNEY
205 South Broadway
Los Angeles, California 90012
Attention: Appellate Division

Attorney General
State Building
Los Angeles, California 90012

Los Angeles Municipal Court
Criminal Clerk.
210 West Temple Street
Los Angeles, California 90012.]

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding, that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JULY 15, 1973, I served the within PETITION FOR REHEARING (Supreme Court No. 70-73) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
600 State Building
Los Angeles, California 90012
(3 copies)

SOLICITOR GENERAL OF
THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530
(3 copies)

DISTRICT ATTORNEY
COUNTY OF ORANGE
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

APPELLATE DEPARTMENT
SUPERIOR COURT
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

MUNICIPAL COURT - HARBOR JUDICIAL DISTRICT
567 West 18th Street
Costa Mesa, California 92626
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 15, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 326½ Main St., Huntington Beach, Ca.
(714) 536-7161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 70-73

MARVIN MILLER,

Appellant,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*, IN SUPPORT OF PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 70-73

MARVIN MILLER,

Appellant,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*, IN SUPPORT OF PETITION FOR REHEARING

Interest of *Amici**

The American Civil Liberties Union is a nationwide non-partisan organization of over 180,000 members engaged solely in the defense of those principles embodied in the Bill of Rights. The American Civil Liberties Union of Southern California is an affiliate of the American Civil

* Burton Marks, counsel for the Appellant, and Michael R. Capizzi, Assistant District Attorney of Orange County, counsel for the Appellee have each orally granted consent to the filing of this brief. Letters embodying such consent will be transmitted to the Clerk as soon as they have been received.

Liberties Union and functions within Southern California where this case arose. During its fifty-three year existence, the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press. While our original concern was with direct governmental efforts to restrict political expression, it has been our experience that when any form of speech or writing, such as "obscenity," is declared beyond the bounds of constitutional protection, such exceptions invariably and inevitably are employed to suppress political expression.

We participated in the earlier proceedings in this case, filing a brief in support of Appellant's contentions. We also filed briefs with regard to the constitutionality of the federal statutes involved in *United States* v. *12 200-Ft. Reels*, No. 70-2 and *U. S.* v. *Orito*, No. 70-69. In those briefs, filed almost two years ago, we presented our views concerning appropriate areas and methods of governmental regulation of obscenity, premised upon our analysis of the Court's precedents in this area. In its five decisions on June 21, 1973, a majority of the Court rejected those contentions and held, instead, that obscene material may be systematically controlled and regulated by all levels of government. We think those rulings are wrong and urge the Court to reconsider them.[1]

But equally important, we are concerned about the effect of those rulings on expression which does not fall into the category of "hard-core pornography." The pressures toward general censorship of disagreeable and dissident expression are hydraulic under the best of circumstances.

[1] Criticism of the premises of the Court's rulings is contained in other briefs *amici curiae* filed in support of the petition for rehearing in *Kaplan* v. *California*, No. 71-1422.

The Court's decisions, with their generalized deference to local powers over obscenity, will provide additional fuel for those forces. In our earlier briefs, we did not emphasize these problems, but it is now clear that the Court's decisions will exacerbate them. Accordingly, our purpose in filing this brief is to identify recent examples of this more generalized variety of censorship and suggest how the Court's decisions will worsen the situation.

ARGUMENT

The Court's decisions will encourage the general pressures toward censorship in American life.

In its decisions, the Court dealt with the use of obscenity laws to prohibit or regulate the dissemination of "hard-core pornography." In *Miller* v. *California,* No. 70-73, the Court announced a new definition of obscenity, including as one of three elements of the new test, that the material "lacks serious literary, artistic, political, or scientific value." And in determining whether any form of expression comes within the definition, the varying "tastes and attitudes" in local communities are to be consulted and relied upon. In *Paris Adult Theatre* v. *Slayton,* No. 71-1051, the Court held that, outside the precincts of the home, obscenity is without substantive constitutional protection, and its communication may be banned virtually at will.

As has been documented in other briefs filed in connection with the rehearing applications in these cases, in the few short weeks since the Court's decisions were announced, there has been a wave of censorship sweeping across portions of this country, encompassing material

admittedly with a sexual content but which in no way could be characterized as "hard-core pornography."[2]

This spasm of censorship of sexually oriented material is, of course, extremely troubling. What troubles us even more, however, is that the censors will not be content to harass vendors of publications such as Playboy magazine, and let it go at that. Their agenda will most certainly include, as it has in the recent past, material whose sexual content is incidental or ancillary to the primary purpose of expressing views which are dissident, satirical, irreverent, profane, or sacrilegious. The presence of sexual content will be used as the pretext for suppressing works because of the ideas they contain, ideas completely divorced from the pornographic. This is not surprising, because

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[2] The publishers of Playboy Magazine have supplied to *amici curiae* incident reports submitted by retailers and wholesalers of Playboy, Oui, Penthouse and similar publications. Those reports demonstrate two distinct patterns resulting from the Court's rulings: (1) harassment by public officials and (2) self-censorship by distributors.

Thus, for example, in Ashland, Ohio, the owners of a candy store were arrested and ten boxes of magazines, including Playboy, were seized. In Greenville, Mississippi, Playboy and similar magazines were confiscated from a supermarket and the distributors were threatened with a fine. In Macon, Georgia, magazines similar to Playboy were confiscated and court proceedings were commenced. In Shreveport and Jackson, Mississippi, public officials ordered such magazines off the newsstands. Similar orders were given to newsstand owners in Hopeville, Virginia, Steubenville, Ohio, and Atlanta, Georgia.

Far worse than these episodes of official harassment are instances of self-censorship where distributors have unilaterally determined to discontinue handling such magazines. For example, in Southern California, a major supermarket chain has stopped selling Playboy. The same thing has occurred in Boise, Idaho. A major drug store chain in Baltimore, Maryland has taken similar action. And in Cleveland, Ohio, the operators of a chain of drug stores have asked to see advance copies of each issue so that they can decide whether to sell Playboy in their various stores.

laws against obscenity have always had another purpose, beyond the interdiction of pornography, namely the suppression of political communication.

Indeed, this Court is familiar with recent examples of that phenomenon.

In *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam), the petitioner, the publisher of an underground newspaper called "Kaleidoscope," was convicted under a state obscenity statute and sentenced to two years in prison. The crimes involved were publishing two photographs of a nude couple embracing, and publishing a "Sex Poem." This Court granted certiorari, determined that the items were not obscene, and reversed the convictions. How would that case have been decided under the new standards? Equally important, will this Court be able to review all such convictions to assure that its recent decisions are applied only to hard-core pornography?

In *Dyson* v. *Stein*, 401 U.S. 200 (1971), police raids were directed at the publisher of Dallas Notes, another underground newspaper, effectively putting it out of business. The predicate for the raids was a search warrant authorizing the seizure of "obscene articles and materials." Will the Court's obscenity rulings deter such practices or encourage them?

In *Papish* v. *University of Missouri Board of Curators*, —— U.S. ——, 41 U.S. Law Week 3496 (March 19, 1973), the petitioner had been expelled from a state university for distributing a newspaper containing "forms of indecent speech," particularly a cartoon depicting a rape of the Statue of Liberty by police, and a headline containing a well-known "twelve-letter" word. The District Court held

that the two items were obscene; the Eighth Circuit affirmed on the theory that the petitioner could be expelled regardless of whether the items were obscene. A majority of this Court held that the cartoon and headline could not be found obscene. There were two dissents, both premised on the concept that university power to suppress "obscene and infantile" expression was greater than state power to prosecute for distribution of the same material. If the petitioner distributed the identical newspaper today, on or off the campus, is it clear that punishment or prosecution could not validly go forward under the Court's recent rulings?

Indeed, on many campuses school officials have consistently attempted to invoke obscenity rules to punish faculty or students for distributing or seeking access to materials which in no legitimate way could be characterized as "obscene." For example, in New York, school officials removed from a school library a book describing ghetto life, entitled "Down These Mean Streets," in part because of complaints that it contained "obscenities and explicit sexual interludes." *Pres. Council, Dist. 25* v. *Community School Board, District 25,* 457 F.2d 289 (2d Cir.), *cert. denied,* —— U.S. ——, 41 U.S. Law Week 3251 (1972). In Ohio, one school district banned "Catch 22" by Joseph Heller and "Cat's Cradle" by Kurt Vonnegut, Jr.; another razored out pages from the "Spoon River Anthology." In Alabama, a teacher was dismissed for assigning another Vonnegut story, "Welcome to the Monkey House," in part because it advocated "free sex." Litigation was necessary to declare that the work was not obscene and secure the teacher's reinstatement. *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D.Ala.

1970). Such examples are merely illustrative. In all of them, the existence of any sexual content at all provided the major premise for the censor's actions.

Similar problems have occurred off the campus as well. In numerous cities, distributors of underground newspapers containing political criticism and satire have been subjected to arrests and harassment, usually because the publications contained some sexual material claimed by police to be obscene. See, e.g., *Washington Free Community* v. *State's Attorney*, 300 F. Supp. 487 (D.Md. 1969); *Great Speckled Bird of Atlanta* v. *Stynchcombe*, 298 F. Supp. 1291 (N.D.Ga. 1970). In various cities, the producers of "Hair," an award-winning musical that successfully ran on Broadway for years, have had to go to court to secure the right to perform their satirical show because it contained brief episodes of nudity. See *Southeastern Promotions, Ltd.* v. *City of Atlanta*, 334 F. Supp. 634 (N.D.Ga. 1971) (and cases cited therein).

And so it goes. The common element in all these cases is the use of obscenity statutes as a vehicle for attempts to suppress political or social commentary. This process occurred during the regime of *Redrup* v. *New York*, 386 U.S. 767 (1967), when very little was thought validly to come within the reach of obscenity laws. The effect of this Court's recent rulings—particularly the reference to local standards of taste in such matters—can only be to accelerate this process. Such considerations of the effects of obscenity laws on material far removed from "hard core" sexual content, appear not to have been brought to the

attention of the Court in any systematic way. For these reasons alone, we submit that rehearing in these cases is necessary.

Respectfully submitted,

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July, 1973